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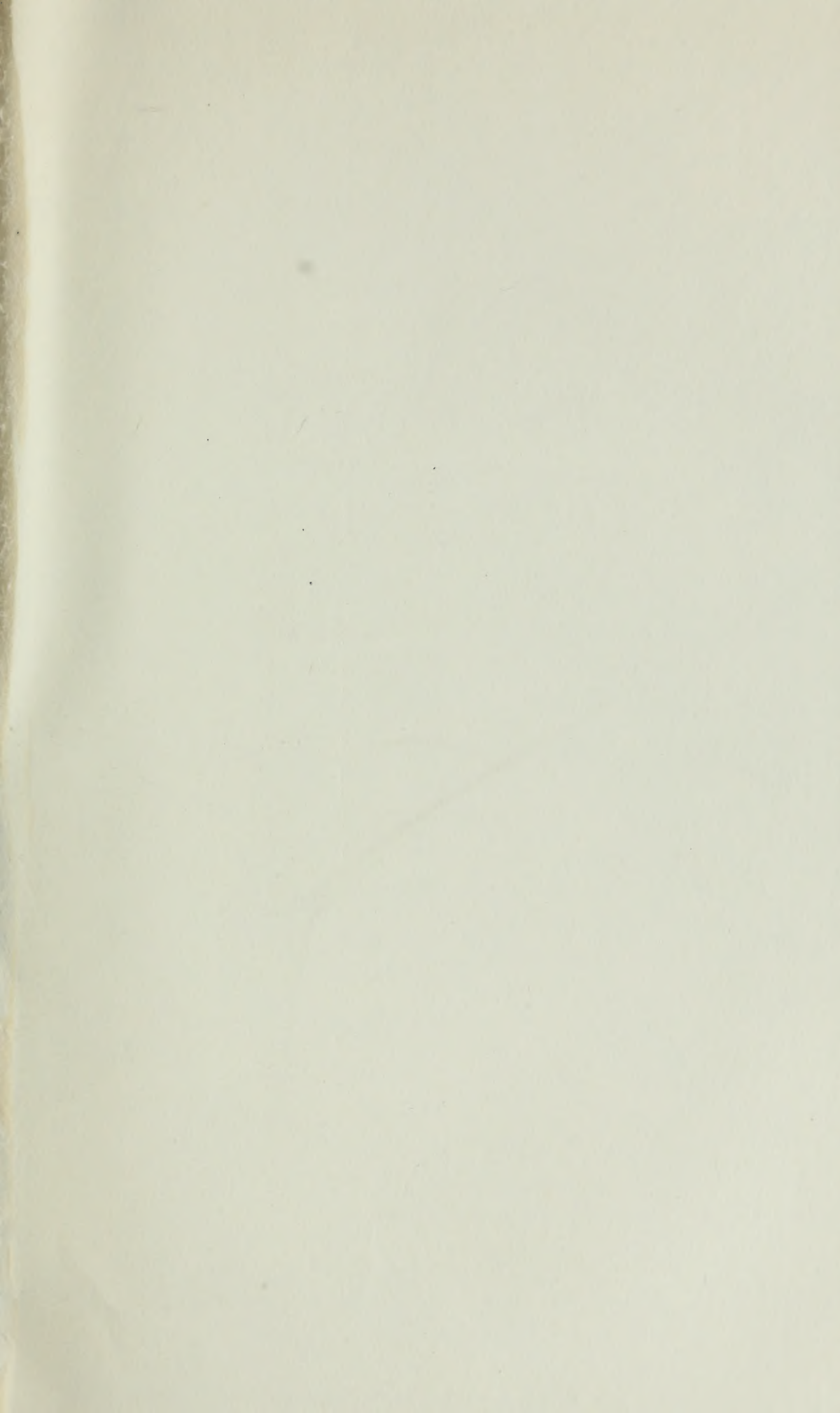
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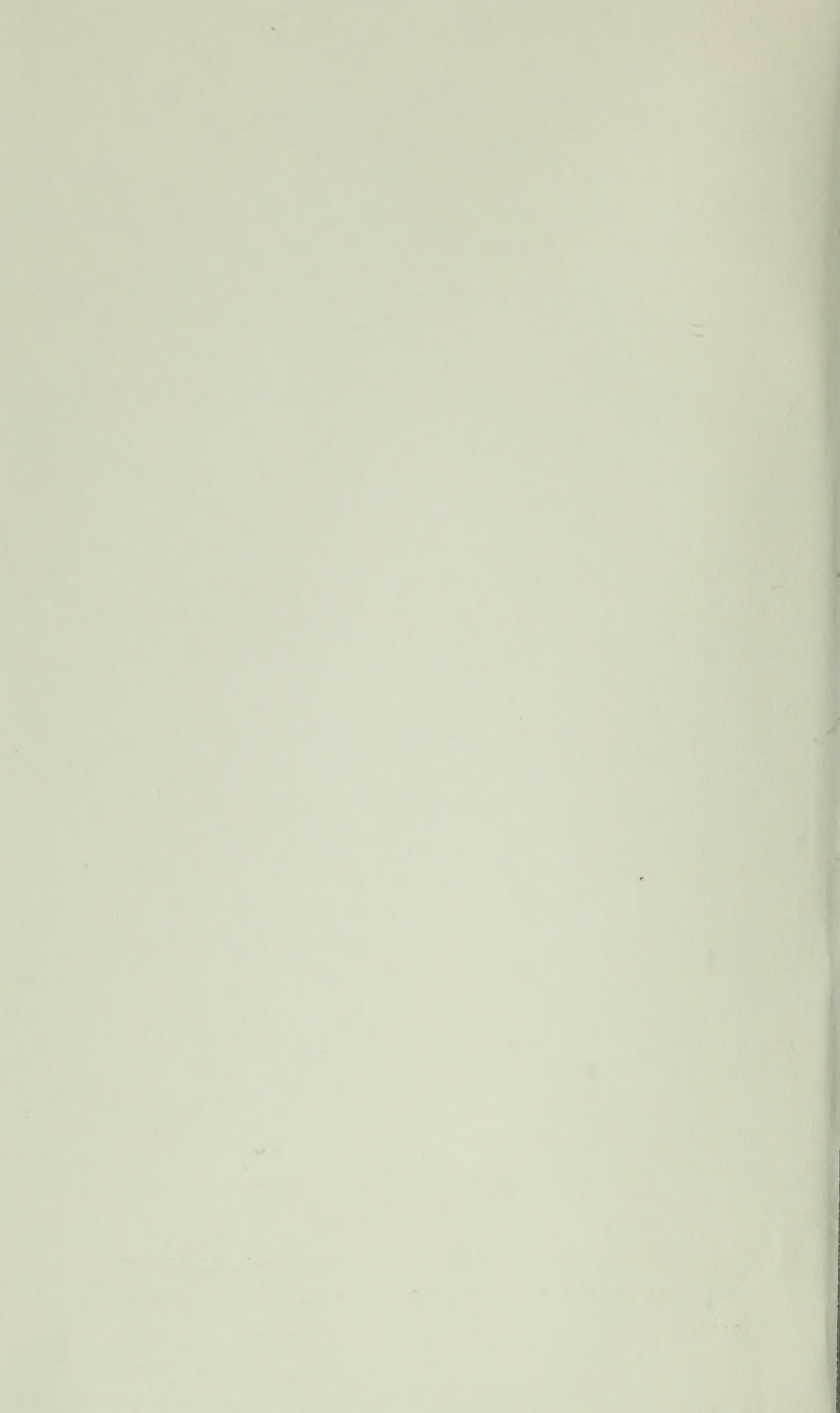
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In the United States Court of Appeals
for the Ninth Circuit

No. 12511

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LAROCHE,
J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE
CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRAN-
CISCO, JOHN H. FAHEY, A. V. AMMANN AND GEORGE K.
BRAMLEY, APPELLANTS, *v.*

PAUL MALLONEE, ET AL., APPELLEES

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL.,
APPELLANTS,

v.

FEDERAL HOME LOAN BANK OF LOS ANGELES, ET AL., APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

BRIEF FOR APPELLANTS AND APPENDIX

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v.

PAUL MALLONEE, ET AL., APPELLEES

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL.,
APPELLANTS,

v.

FEDERAL HOME LOAN BANK OF LOS ANGELES, ET AL., APPELLEES

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION*

BRIEF FOR APPELLANTS AND APPENDIX

OPINION AND ORDER OF THE DISTRICT COURT

The oral opinion of the District Court appears at R. 11146, and the Order of Preliminary Injunction at R. 8194.

JURISDICTIONAL STATEMENT

This is an appeal by appellants Home Loan Bank Board, William K. Divers, O. K. LaRoche, J. Alston Adams, John H. Fahey, A. V. Ammann and George K. Bramley, individ-

ually and in their respective representative and official capacities, if any; the Federal Savings and Loan Insurance Corporation; and the Federal Home Loan Bank of San Francisco, from a Preliminary Injunction issued by the United States District Court for the Southern District of California enjoining (1) the Home Loan Bank Board, its members, and other persons and defendants from holding or participating in an administrative hearing which was on September 9, 1949, ordered by Home Loan Bank Board Order No. 2015 to be held in Washington, D. C., on October 25, 1949, and (2) the initiation of or participation in any administrative or judicial proceedings by any person in conflict with the alleged jurisdiction of the court below (R. 8306).

The injunction was issued in connection with two separate actions which the District Court consolidated into one action (R. 8223-8224). The first of these, No. 5421-P.H., hereinafter referred to as the "Mallonee action", was an action by shareholders of the Long Beach Federal Savings and Loan Association suing derivatively, with a substantially identical cross-claim by the Association, to oust a Conservator appointed on May 20, 1946, for that Association by the Federal Home Loan Bank Administration and for other relief. The court below was alleged in both the complaint (R. 2961-2962) and cross-claim (R. 3189-3191) to have jurisdiction by reason of the presence of a substantial Federal question and diversity of citizenship. 28 U.S.C. 1331, 1332. It was further alleged that the amount involved was approximately \$70,000,000 (R. 2962, 3190).

The second action, No. 5678-P.H., hereinafter referred to as the "Los Angeles action", was instituted by the Federal Home Loan Bank of Los Angeles and six of its member financial institutions (R. 9466) to set aside as void three orders, dated March 29, 1946, of the Federal Home Loan Bank Administration which, *inter alia*, dissolved the Federal Home Loan Bank of Los Angeles and transferred its assets and liabilities to the Federal Home Loan Bank of San Francisco. Jurisdiction was based on the allegations that

the action arose under the Constitution and laws of the United States and that the amount in controversy exceeded the sum of \$45,000,000 (R. 9466).

The order of preliminary injunction was filed on December 1, 1949, and entered in Judgment Book No. 62, p. 18, of that Court on December 2, 1949 (R. 8537). Notice of Appeal was filed by all appellants except the Federal Home Loan Bank of San Francisco on December 29, 1949, and by the Federal Home Loan Bank of San Francisco on January 5, 1950 (R. 8559).

This Court has jurisdiction of this appeal under Section 1292 of Title 28 U.S.C.

STATEMENT OF THE CASE

A. Summary Outline of Proceedings Prior to the Injunction on Appeal.

Dissolution of the Los Angeles Bank: On March 29, 1946, the Federal Home Loan Bank Administration, predecessor of appellant Home Loan Bank Board (R. 8196n) issued and carried into effect three orders, Numbers 5082, 5083, and 5084, pursuant to Sections 3, 25 and 26 of the Federal Home Loan Bank Act (App. A, *infra*, p. 114), readjusting the Eleventh Federal Home Loan Bank District so as to include the territory of the then Twelfth District, dissolving the Federal Home Loan Bank of Los Angeles which had served the Twelfth District, transferring its assets and liabilities to the Federal Home Loan Bank of Portland serving the Eleventh District, and reconstituting the latter as the Federal Home Loan Bank of San Francisco with headquarters at San Francisco, California. These orders expressly recited, in substantially the words of Section 26 of the Act, that "the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act, as amended, will be aided by the action".

The Long Beach conservatorship, May 1946 to January 1948: On May 18, 1946, the Federal Home Loan Bank Administration commenced an investigation of the affairs of the Long Beach Federal Savings and Loan Association, Long Beach, California (R. 3209), as authorized and

directed by Section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464) (App. A, *infra*, p. 130).

On the same day, T. A. Gregory, president and member of the board of directors of the Association, together with three other directors thereof, converted or attempted to convert their existing savings (share) accounts in the Association and other funds into 21,000 separate one dollar (\$1.00) savings accounts (R. 3231, 3241-3). The 21,000 separate one dollar accounts represented 10 per cent of the total votes available to all of the Association's members (R. 3242).

On the same day, a check of \$50,000 was paid by an officer of the Association to R. H. Wallis, an attorney, pursuant to a resolution of the Association's board of directors, dated May 8, 1946 (R. 3230, 3239-3240). The resolution was adopted in purported anticipation of "retaliation" by "federal supervising authorities", and authorized the expenditure of \$100,000 to employ legal counsel to conduct proceedings to "restrain" the Federal Home Loan Bank Commissioner, the defendant Fahey, from "interfering" with the "normal" conduct of the Association's business (R. 3237). The funds thus appropriated were intended to be used to defend against the anticipated appointment of a Conservator for the Association on allegedly unwarranted charges of personal misconduct by the Association's management (R. 91-93, 3227, 3232, 3237-3239).

On May 20, 1946, pursuant to Section 5(d) of the Home Owners' Loan Act (12 U.S.C. 1464(d); App. A, *infra*, p. 130), the Administration issued its Order No. 5254, appointing the defendant A. V. Ammann Conservator for the Association upon the stated ground that the Association had a management which was "unsafe" and "unfit to manage" a Federal savings and loan association (App. C, *infra*, p. 172).

On May 29, 1946, pursuant to the Association's request (R. 345-346), the Administration furnished a "More Definite Statement" of the grounds for the Conservator's appointment (App. C, *infra*, p. 173). The "Statement" recited (in addition to the creation of the 21,000 share accounts and the authorization for attorneys' fees), the

disbursement to T. A. Gregory of \$14,500 of the Association's funds for purposes alleged to be beyond the scope of the Association's business; the reimbursement of the \$14,500 by a retroactive increase of \$11,750 in said Gregory's salary for the preceding year 1945, and the increase of his salary, effective January 1, 1946, from \$8,250 per annum to \$20,000 a year, with an entry offsetting the \$14,500 against the increase of \$11,750 for 1945 and the salary increase for the first three months of 1946; the use of the Association for personal gain of one or more of its officers; and the report, which had but recently become known to the Administration, that Gregory had previously so manipulated the affairs of another association, the Reliable Building-Loan Association, Long Beach, California, as to acquire its certificates at a small fraction of their true value and thereafter caused them to be paid in full. For these reasons, the "Statement" declared, the Association, "in the opinion of the Federal Home Loan Bank Administration, had a management which was unfit and unsafe to manage a Federal Savings and Loan Association" (App. C, *infra*, p. 176).

The conservatorship was terminated on January 24, 1948 (R. 8320), pursuant to Order No. 338 of the defendant Home Loan Bank Board, the Administration's successor.

Long Beach's prevention and deferment of administrative hearing: At the Association's request (R. 140), an administrative hearing was originally scheduled for July 3, 1946, to determine whether the Conservator's appointment was warranted or should be terminated (R. 144). Before the scheduled date for administrative hearing, however, the Association's shareholders commenced this litigation, in the course of which the administrative hearing was first enjoined, and thereafter, at the Association's request (R. 2908), deferred throughout the 19 months of the conservatorship (R. 372, 745, 8230-1).

The original complaints and cross-claims: The validity of the Conservator's appointment and his each and every act in the management of the Association was promptly challenged in the court below, both by plaintiffs, shareholders of the Association, in a complaint filed May 27, 1946

(R. 2), and by the “defendant” Association, in its cross-claim filed July 1, 1946 (R. 323), as well as by the “defendants” R. H. Wallis (the above mentioned attorney) and Title Service Company (named as trustee under trust deeds securing loans made by the Association to some 8,000 borrowers) in cross-claims in “interpleader” filed on June 12 and June 4, 1946, respectively, alleging conflicting demands on said cross-claimants by the Conservator and the Association’s former management concerning individual transactions in the operation of the Association (R. 49, 95).¹

Plaintiffs and cross-claimants each alleged that the order appointing the Conservator was unconstitutional and was issued solely because of “malice” of the defendant Fahey against Gregory (R. 15-16, 348), and that prior resort to the administrative remedy should not be required because of “bias and prejudice” of the defendants Fahey and Ammann and because they had “already decided and determined the issues upon which they proposed to hold said administrative hearing” (R. 364). The administrative hearing was, in fact, promptly enjoined by restraining order of July 1, 1946 (R. 372).

On July 1, 1946, the Association filed a third party complaint against the San Francisco Bank challenging the validity of the orders of March 29, 1946, dissolving the

¹ Cross-claimant Wallis tendered in court the above mentioned \$50,000 check praying for a determination whether he should return the check as demanded by the Conservator or use it for the purposes previously authorized by the Association’s board of directors, as demanded by the Association’s former management (R. 98). Title Service Company deposited in court 174 trust deeds transmitted to it by the Conservator with the information that the borrowers had made final payment and requesting the Company to execute a reconveyance to the borrower, and prayed for judgment whether the Company should execute such reconveyance as demanded by the Conservator, or refuse to do so, as demanded by the Association’s former management. Title Service Company also prayed that the trust deeds on the remaining 8,000 loans, which were in the physical custody of the Conservator, be ordered to be deposited in court (R. 53). As a result, at least fifty interventions in the Mallonee action were filed by borrowers to obtain reconveyances. See *infra*, p. 16.

Los Angeles Bank (R. 287). The latter Bank, named as a nominal defendant, filed a like cross-complaint against the San Francisco Bank (R. 564). On August 22, 1946, the Los Angeles Bank and six of its former member associations filed an identical complaint in an independent proceeding, herein referred to as the "Los Angeles action" (R. 9465).

The original District Court decree of injunction: On September 5, 1946, before any answer of the Government defendants was filed or due, a three-judge District Court held Section 5(d) of the Home Owners' Loan Act of 1933 unconstitutional, and, on September 30, 1946, entered a decree removing the Conservator and permanently enjoining the holding of an administrative hearing (R. 743). On the next day, however, October 1, 1946, the Honorable Wiley Rutledge, Associate Justice of the United States Supreme Court, entered an order staying enforcement of the decree pending appeal to the Supreme Court (R. 762).

Reversal by Supreme Court: On June 23, 1947, the Supreme Court unanimously reversed the judgment of the District Court, holding that "it was error in the court below to hold the section unconstitutional, to oust the Conservator or to enjoin any of his proceedings or to enjoin the administrative hearing, and this without prejudice to any other administrative or judicial proceedings which may be warranted by law". *Fahey v. Mallonee*, 332 U.S. 245, 257-258. The Supreme Court also set aside a provision of the District Court's decree enjoining the defendants from merging the assets of the Association with those of any other institution, on the Government's assurance that there was no intention to effect any such merger. 332 U.S. at 257. "We cannot agree", the Court said, "that courts should assume in advance that an administrative hearing may not be fairly conducted." *Id.* at 256.

Filing of amended and supplemental complaints and cross-claims: Judge Hall, before whom all subsequent proceedings were held, concluded that the administrative remedy need not be invoked provided the pleadings were amended to allege "fraud" (R. 10298, 10300), and, on

November 10, 1947, gave leave to amend accordingly (R. 2793).²

Amended pleadings alleging "fraud" were filed by the shareholders on December 9, 1947 (R. 2960), and by the Association on January 12, 1948 (R. 3184). Cross-claims for money damages were subsequently filed by the Association (R. 4161).

On November 10, 1947, the court below overruled motions to dismiss the cross-claims in interpleader of Title Service Company and R. H. Wallis (R. 2790-2793). On January 29, 1948, following the termination of the Conservator's appointment, a third so-called "cross-claim in interpleader", that of George Turner, was filed for a determination of the disposition of rentals owed by Turner on a lease from the Association which lease was listed in the "More Definite Statement" of May 29, 1946 (R. 3461). Two further so-called "interpleaders" were subsequently entertained by the court below in the consolidated actions—the first, a motion by the Association to impound notes, evidencing a loan from the San Francisco Bank to the Association during the conservatorship, to determine whether the obligations, if any, of the Association thereunder were owing to the Los Angeles or the San Francisco Bank (R. 3562, 8296); and the second, proceedings "in the nature of interpleader" to determine the extent of insurance premium liability of the Association to the Federal Savings and Loan Insurance Corporation (R. 6473, 8297).

Out-of-state service on nonresident appellants: The appellants Ammann and the Federal Home Loan Bank of San Francisco were personally served in the State of California (R. 41, 9506). Neither the defendant Fahey,

² Judge Hall also did not accept the Government's assurance that no dissolution or merger of the Association was intended, and, on the basis of the plaintiffs' affidavits filed in support of the *ex parte* restraining order issued on May 27, 1946, found that such had been intended, and that counsel for the plaintiff-shareholders was entitled to an interim allowance of attorneys' fees for services, among others, in securing the District Court injunction which the Supreme Court dissolved (R. 2355-2366).

however, officially resident in the District of Columbia and individually resident in the State of Massachusetts (R. 2997), nor those substituted as parties defendant in their capacity as Board members (R. 2771, 2776, 4547-4548, 9532, 4610), likewise officially resident in the District of Columbia, were personally served in California (R. 75-76, 4610).

Service of the complaints in the consolidated actions, designated as *in rem* actions for the return of property located in the State of California, was made pursuant to order for service on nonresident defendants under former Section 118 of Title 28 U.S.C. (now Section 1655) (R. 65-68, 4340, 9502-9510). The Federal Savings and Loan Insurance Corporation, with headquarters in the District of Columbia and which neither maintains an office nor has any agent or representative in the State of California (R. 5301), also was served only in the District of Columbia pursuant to like order (R. 5357). Service of the so-called "cross-claims in interpleader" was made on the nonresident defendants purportedly pursuant to former Section 41 (26) of Title 28 U.S.C. (now Sections 1335, 1397, 2361) (R. 78-80, 445-446).

Appellants' answers and motions to dismiss: Pursuant to court order of June 6, 1948, answers of these appellants to all pleadings were filed on July 30, 1948 (R. 5056, 5063, 5073, 5102). The answers alleged, *inter alia*, that the District Court lacked jurisdiction both over the persons of the nonresident defendants, and of the subject matter of the actions, and that none of the complaints or cross-claims stated a claim for which relief could be granted. The same defense had also been promptly made on the institution of the litigation (R. 5308). Motions to dismiss by Home Loan Bank Board, its members and defendants Fahey, Ammann, and the Federal Home Loan Bank of San Francisco, and other defendants, filed on September 13, 1948 (R. 5308), were finally overruled on October 17, 1949 (R. 7959). The Federal Savings and Loan Insurance Corporation, served as nonresident defendant on September 20, 1948 (R. 5357, 5393), filed a motion

to dismiss on November 22, 1948 (R. 5468), which was overruled on October 17, 1949 (R. 7959), and filed an answer to all current pleadings on July 18 and August 7, 1949 (R. 6978, 7008, 7021, 7051).

B. *The Injunction on Appeal.*

On September 9, 1949, having received no monthly or annual report from the Association since the removal of the Conservator, the Home Loan Bank Board, by Order No. 2015, directed an investigation and hearing to be held to determine what appropriate administrative action, if any, should be taken, including the possible appointment of a receiver. (App. C, *infra*, p. 178).

The order provided in material part:

“WHEREAS it appears to the Home Loan Bank Board that:

1. The Long Beach Federal Savings and Loan Association, Long Beach, California, has failed to file the monthly and annual reports required by the Rules and Regulations for the Federal Savings and Loan System;

2. Said Association has failed and refused to furnish an affidavit of its president or secretary or other officer that, to the best of his knowledge and belief, the books of said Association correctly reflect the financial condition thereof, as required of all Federal savings and loan associations;

3. Said Association has failed to pay the premiums for insurance of its accounts and the installments thereon due and payable on or about June 5, 1948, December 5, 1948, and June 5, 1949, in the total amount of \$36,487.25, in violation and disregard of the statutes of the United States, the Rules and Regulations for Insurance of Accounts, and its contract with the Federal Savings and Loan Insurance Corporation;

4. Said Association and its officers have committed and are committing other violations of law and regulations, including violations set out in the More Definite Statement submitted to said Association on May 29, 1946, and have pursued and are pursuing a course that is jeopardizing and injurious to the interests of its members, creditors, and the public;

“IT IS HEREBY ORDERED, pursuant to the authority vested by law in the Home Loan Bank Board and pursuant to the Rules and Regulations for the Federal Savings and Loan System, that the Long Beach Federal Savings and Loan Association, Long Beach, California, appear at a hearing, as hereinafter provided, and show cause, if any it have, why the Home Loan Bank Board should not, for the reasons hereinbefore stated, enter its order or orders for such action as it deems necessary or appropriate, including the appointment of the Federal Savings and Loan Insurance Corporation as receiver for said Association;” (App. C, *infra*, p. 178).

On October 17, 1949, on motion of the plaintiff-shareholders (R. 7694), the cross-claimant Association (R. 7804), and cross-claimants in “interpleader” Title Service Company (R. 7659), R. H. Wallis (R. 8196), and George Turner (R. 7676), the court below restrained the holding of the Board hearing for ten days by *ex parte* order (R. 8328), which order was on October 28, 1949, extended for a further ten days (R. 8357), and after hearing on November 8 and 9, was ultimately continued by the preliminary injunction from which this appeal is taken (R. 8194). The findings in the injunction order, filed December 1, 1949 (R. 8537), were formulated at a separate *ex parte* hearing held on November 11, 1949, from which Government counsel was expressly excluded (R. 11174, 11176-11177), and at which all issues of fact and law bearing on the merits of the case were fully canvassed (R. 11178-11378).

C. *The Grounds Assigned for the Injunction on Appeal.*

In issuing the injunction, the court below held that it had jurisdiction over all persons and parties to the consolidated actions and of the subject matter thereof (R. 11146-11153); that the proposed administrative hearing, insofar as it related to the charges made in the “More Definite Statement” of May 29, 1946, involved the same matters as those at issue in the pending Mallonee action (R. 11157), and insofar as it related to the failure of the Association to file monthly and annual reports, was unwarranted because the filing of such reports would require

the Association to waive its claims for damages and other relief in the pending Mallonee action (R. 11153-11154, 11157-11158); that the holding of the administrative hearing would thus interfere with the court's jurisdiction, as well as with the enforcement of orders theretofore entered by the court in ancillary proceedings (R. 8263, 8271); and that if there were any legitimate grounds for complaint against the Association's management, the Board could file its complaint with the court and obtain from it any appropriate relief, including the appointment of a receiver or conservator (R. 8256, 11162).

In issuing the injunction the court found it "impossible" to state all of the issues which might be involved in the Mallonee action upon the ground, among others, that "the present posture of the case is not such as to permit a * * * clarification of the issues" (R. 8277). The matters involved in the complaint and cross-claims in the Mallonee action, however, and the prior orders and ancillary proceedings therein, on which the injunction was thus based, may be briefly summarized; no separate matters were alleged, or orders entered, in the Los Angeles action.

The matters involved in the complaints and cross-claims: The original complaint in the Mallonee action (R. 2) and Association cross-claim (R. 323) alleged that the statute and the rules and regulations, pursuant to which said Conservator was appointed, were unconstitutional; that there were no valid grounds for the appointment of a Conservator; that prior to the appointment of the Conservator, the defendant Fahey had been involved in a dispute with the then directors of the then Federal Home Loan Bank of Los Angeles concerning the appointment of a president of said Bank; that one T. A. Gregory, President of said Association, was a director of said Bank and active in said dispute; that to resolve the dispute the defendant Fahey, by three orders issued on March 29, 1946 (App. C, *infra*, p. 169), unlawfully dissolved the Bank of Los Angeles and transferred its assets to the Bank of Portland, reconstituted as the Bank of San Francisco, along with certain assets belonging to said Association then in the possession of the Bank of Los Angeles; that the Association and

Gregory intended to bring legal actions to recover the said assets of the Association and that a Congressional investigation was pending with respect to the dissolution of said Bank (R. 11-13, 340-344); and that, to prevent the bringing of said legal actions and holding of said Congressional hearing, and as retaliation against Gregory and “solely” by reason of “malice and ill will on the part of said defendants” against Gregory the defendant Fahey appointed defendant Ammann as Conservator for the Association (R. 16, 343-344).

The amended complaint (R. 2960) and cross-claims of the Association (R. 3188) filed in December 1947 and January 1948 and each consisting of seven separate counts, set forth substantially the same allegations, together with the general averment that the findings made by the defendant Fahey in the order appointing the Conservator and in the “More Definite Statement” were false and known to him to be false (R. 2977), and that the order was therefore “fraudulent” (R. 3011).

The complaint in the Mallonee action and Association cross-claim both proceeded on the avowed theory that, as the Conservator’s appointment was illegal, each and every transaction of the Association during the conservatorship was “void, ab initio,” and subject to challenge pending the outcome of the litigation testing the validity of the appointment (R. 3079, 3321). It was alleged that, on the appointment of the Conservator, withdrawals in excess of \$6,000,000 of savings (share accounts) occurred (R. 311, 3220, 3246), and that thereupon the Association, during the conservatorship, borrowed a like amount from the San Francisco Bank, pledging as security therefor, approximately \$12,000,000 of the Association’s notes and trust deeds on homes of 8,000 borrowers (R. 3224, 667-668, 3584-3586), thereby clouding the titles thereto; used the Association’s funds to pay principal and interest to the Bank and to purchase shares therein (R. 4219, 4222, 4227, 4229); sold millions of dollars of the Association’s United States Government bonds (R. 4197, 4199, 4201, 4204); and made \$4,000,000 of “improvident” loans (R. 4174). Each

of these transactions allegedly gave rise to “controversies” which “were increasing multifold, both in number of parties, in the millions of dollars involved, and are snowballing in magnitude to the point of making extremely difficult a final settlement * * * ” (R. 3310-3311).

Relief prayed for: The relief originally prayed for included the removal of the Conservator; the return of the Association’s assets to its former management; the filing of a “detailed” statement or “accounting” describing the assets turned over to the Conservator on the date of his appointment and each of the Conservator’s subsequent dealings therein (R. 22-23, 350-351); and a determination whether the Los Angeles Bank was lawfully dissolved (R. 300-301). As amended, the complaint and cross-claims further prayed for a judgment decreeing that all obligations incurred by the Association during the conservatorship, particularly the loan from the San Francisco Bank, and all transfers of the Association’s property in pledge or otherwise during the same period, were null and void, and directing that all such property in the possession or control of the defendants be returned to the Association, or that, if any such property could not be so returned, the Association be awarded money damages against the defendants personally served within the local district in the amount of the highest value from the time the property was allegedly converted to the date of the trial (R. 3317). The Association’s supplemental cross-claim, filed May 27, 1948, prayed for such damages without limitation to the property which could not be so returned or to the defendants thus served (R. 4161, 4167, *et seq.*).

The parties defendant: Conformably with these allegations, thousands of parties were named defendants, including 8,000 “John Doe Borrowers” from the Association; 100 “Intermeddling Does” dealing with the defendants Fahey and Ammann in the “handling or transfer” of the assets belonging to the Association or insuring titles to real property theretofore conveyed in trust to Title Service Company; 100 “John Doe Receivers” who allegedly had taken “or may take” real, personal or other prop-

erty from said defendants “without or with the payment of actual consideration therefor”; 100 “John Does”, allegedly named as trustees under deeds of trust executed in favor of the Association since the Conservator’s appointment, or who had accepted, or “may” accept, assignments of notes or other choses in action from said defendants; as well as hundreds of “John Does” and “Jane Does”, “Roe and Doe” co-partnerships, “Black and Company” corporations, 1 to 100 inclusive, and “Red Associations”, whose activities and dealings with the defendants are not specifically alleged in the complaint or cross-claims (R. 3002-3008, 3281-3288). From time to time, numerous parties included in one or other of these captions were specifically named as parties defendant.³

The ancillary proceedings and orders therein: On the same basis, individual business transactions between the Association and third parties during the conservatorship were challenged in ancillary proceedings, beginning with the filing of the cross-claim of the Title Service Company (R. 43). This company, organized by the management of the Association in 1935 without issued capital stock, with officers and directors substantially identical with those of the Association (R. 11087), was originally named in the shareholders’ complaint as a “John Doe” defendant (R. 153). On June 5, 1946, as above stated, and thereafter from

³ Included among these were all past and present officers and directors of the Federal Home Loan Bank of San Francisco (R. 8207); the Federal Savings and Loan Insurance Corporation (R. 8197n); 10 savings and loan associations located in Northern California and the 80 officers and directors of said associations (R. 8197-8198n); Land Title Insurance Company, a corporation which allegedly undertook to insure titles of borrowers during the period of the conservatorship (R. 3038) (R. 2061); Newendorp and Bradley, shareholders of the Association who filed suit in the state courts of California against T. A. Gregory and other officers and directors of the Association for mismanagement and breach of trust (R. 3445-3446, 8385-8386); and, in connection with certain of the numerous motions filed by the plaintiff-shareholders and the Association and court orders issued pursuant thereto, all the 300 odd associations and other member financial institutions of the present Eleventh Federal Home Loan Bank District covering nine states and two territories (R. 8198n).

time to time, the Title Service Company filed so-called cross-claims in interpleader, alleging in substance that it had been named as trustee in 8,000 trust deeds securing loans made by the Association with a remaining balance of over \$12,000,000, and that it was faced with conflicting demands, one from the Conservator requesting it to make reconveyance of title to borrowers on repayment of loans secured by said trust deeds, and the other by the defendant Association directing it not to make such reconveyance, and praying that the court adjudicate the rights of the adverse claimants (R. 53, 766, 995, 2305, 2581).

Any corporation undertaking to insure titles for borrowers willing to accept a reconveyance from the Conservator without concurrence of Title Service Company, was promptly made a party defendant.⁴

The court overruled motions to dismiss the Title Service Company cross-claim (R. 752, 2790-2793), and, borrowers desiring to obtain reconveyances of title on final repayment of loans from the Association were required to intervene in the Mallonee action and to deposit their final payment in the registry of the court (R. 8291-8293). The court orders authorizing the interventions directed the Conservator to deposit in court all sums paid by the borrower-intervenors during the conservatorship, after which the court directed delivery of the reconveyances of title theretofore deposited in the court by the Title Service Company (R. e.g. 2867). At least fifty such intervention proceedings were conducted in the Mallonee action (R. 8287).

The Conservator's protest that such procedure would tie up the Association's funds was unavailing (R. 10204). As of January, 1948, the total thus deposited in court amounted to approximately \$1,600,000 (R. 8291), an amount substantially in excess of the total surplus and reserves of the Association at the time of the Conservator's appointment (R. 361). No interest was earned on any

⁴ The Land Title Insurance Company, which offered to insure title without regard to this alleged cloud on title, was promptly for this reason named a defendant and co-conspirator in the Mallonee action (R. 3033-3039).

part thereof and none of the amount thus deposited was available for use by the Conservator in current operation of the Association (R. 11456-11457). .

On January 17, 1948, when the Association's working capital had been thus depleted, the Home Loan Bank Board issued Order No. 388, providing for the termination of the Conservator's appointment (R. 3404). Order No. 388 directed the Conservator to furnish a full accounting to the shareholders; the Board Regulations provided for a "detailed" report and review of the Conservator's "accounts" on termination of his appointment (App. B, *infra*. p. 161). A copy of the order and accounting was to be filed in court (R. 3404).

The Board decided that the termination should be effective upon the holding of a new election of directors by the Association shareholders (R. 10312), a condition authorized by regulation in the Board's discretion. (App. B, *infra*, p. 164) Judge Hall, however, decided that such election should be held only after the restoration of the former management, and on January 23, 1948, ordered the Conservator to return the Association to its former management and to file an accounting, with provision for a subsequent election of directors (R. 8310). Certain appeals theretofore taken by the former Conservator from orders in borrower-intervention proceedings, and from an order allowing attorneys fees, having thus become moot, were voluntarily dismissed (R. 3550). The accounting was filed on September 27, 1948 (R. 8235-8239).

New ancillary proceedings followed. Pursuant to an order dated March 13, 1948, sought and obtained by the cross-claimant Association, the Bank of San Francisco deposited in court the notes representing the loan in the unpaid balance of \$6,300,000, theretofore advanced by the Bank to the Association represented by the former Conservator, together with trust deeds in the approximate amount of \$12,000,000 and \$5,000,000 of Government bonds assigned by said Conservator on behalf of the Association as collateral to secure repayment of the loan (R. 8194). This proceeding was treated as one of the "interpleaders"

on which the court below rested its jurisdiction over non-resident defendants (R. 8296).

Pursuant to further order of the court dated March 26, 1948, sought and obtained by the Association, the trust deeds thus deposited by the San Francisco Bank were returned to said Association and the Association pledged as collateral in lieu thereof the proceeds theretofore paid into court by the aforementioned borrowers, together with Government bonds in the amount of \$5,300,000 (R. 8526). In so ordering, the court found that, notwithstanding the termination of the conservatorship, the trust deeds were still subject to conflicting claims of the San Francisco and former Los Angeles Banks, and that, as working capital was required in sufficient amounts for the operation of the Association, borrower-intervention proceedings and payment into court of loan repayments in connection therewith to clear the borrowers' title, should be discontinued (R. 8529). During the conservatorship, the court overruled the objection that the depletion of working capital in such collateral proceedings (totalling \$1,600,000 in January, 1948) would hamper the Association's operations (R. 10204).

On July 6, 1948, the Association filed a petition for an order to show cause why the Federal Home Loan Bank of San Francisco should not be dissolved, on the ground that the holders of a majority of the shares owned by member (voting) associations (a minority of the total shares, the majority shares then being held by the Government (R. 7242)) either had voted or would vote to dissolve the Bank (R. 4552). A copy of the motion was served on every association member of the Bank throughout nine states and two territories of the Eleventh District (R. 4596). The court, after issuing a show cause order, has held its decision thereon in abeyance ever since, and assigned the pendency of the motion as one ground for issuing the injunction from which this appeal is taken (R. 8269, 8303).

In April 1949 the court permitted the plaintiff-shareholders and the Association to interplead \$24,374.06, the amount of insurance premiums claimed by the Federal Savings

and Loan Insurance Corporation to be due it, an interpleader filed on the ground that nonpayment might render the association liable to the Insurance Corporation, while payment might render the Association's management liable to its shareholders (R. 6473). Several deposits of additional insurance premiums were thereafter made on the same theory (R. 6920, 8965). This is the fifth of the so-called interpleaders invoked as the basis for jurisdiction over the nonresident defendants (R. 8297). There has been no payment of insurance premiums by the Association since the removal of the former Conservator, although the Insurance Corporation is required by statute to insure every Federal savings and loan association (App. A, *infra*, p. 133) (12 U.S.C. 1724, 1726).

In May 1949, further supplemental pleadings and cross-claims were filed by the plaintiff-shareholders and the Association (R. 6736, 6798, 6850), against the Insurance Corporation and the Home Indemnity Company, the principal on the former Conservator's fidelity bond. These pleadings repeated the purported interpleader of insurance premiums, and added a claim for damages against the Insurance Corporation on the ground that its acceptance of insurance premiums from the former Conservator and continued insurance of the Association during the conservatorship, aided and abetted the unlawful operations of the Conservator (R. 6785).

Each of the above ancillary proceedings was assigned as among the grounds for issuance of the injunction on appeal (R. 8268-9, 8283-4, 8287-91, 8295-7).

As the ancillary proceedings progressed, negotiations ensued to determine whether the protracted litigation, which was thus "increasing multifold" and "snowballing in magnitude" (R. 3310), could be brought to an end by compromise and settlement (R. 10880-2). On motion of the Association, the court entered successive injunctions restraining any judicial and administrative proceedings which might impede a settlement on terms satisfactory to the parties, including the Association.

By order dated July 20, 1948, and on petition of the plaintiffs and cross-complainants in the Mallonee action, 10

of the association members of the Bank of San Francisco were enjoined from maintaining proceedings against the Bank in the Northern District of California, with reference to settlement negotiations (R. 4672), and were thereafter served as "Red Association" defendants (R. 4782, *et seq.*). By order dated February 2, 1949, the court remanded to a state court of California, for lack of Federal jurisdiction, a derivative action brought by H. L. Newendorp and C. E. Bradley, shareholders of the Long Beach Federal Savings and Loan Association, against T. A. Gregory and others based on alleged fraud and mismanagement (R. 5760). At the same time, however, the court enjoined the plaintiff-shareholders in that action from prosecuting the proceeding in the state court during the pendency of the Mallonee action. Newendorp and Bradley were named defendants in the Mallonee action (R. 3459).

On October 26, 1949, the Government, in response to court order, advised that the financial concessions to the Association, embodied in the Association's proposal for settlement and petition for compromise judgment, were not in the public interest and provided "no basis in principle for further negotiations" (R. 10880-2). In issuing the restrictive injunction against the Board, however, Judge Hall took into consideration his efforts to "keep the people in that climate" of "settlement" (R. 11154, 11155).

The 24 printed volumes of the record on appeal include the principal pleadings and some of the ancillary proceedings below. No date for trial has been set. Certain "speaking" motions must be disposed of before the case is "at issue" (R. 8257), and ruling thereon is being held in abeyance (R. 8257) pending completion of the Association's examination of all the books and records of the San Francisco Bank for the year 1943 to date, commenced in December 1948 (R. 8257), and now in progress (R. 11412, *et seq.*).

Pending completion of such examination the court below also postponed the time for filing of cross-interrogatories by plaintiffs and the Association in connection with the San Francisco Bank's taking of the deposition of defendant

Fahey (R. 11464), whose alleged motives in issuing the orders of March 29, 1946 and May 20, 1946 are the basis of the Mallonee action. Mr. Fahey, as the court was then advised, suffered from disabilities due to age and illness (R. 8259-61n). On November 19, 1950, we regret to advise the Court, Mr. Fahey died.

QUESTIONS PRESENTED

1) Whether, consistently with the policy of the Home Owners' Loan Act, each and every contract made, transfer executed, or other act performed, by the Conservator before the termination of his appointment, may be collaterally attacked in a proceeding to set aside each such act as void or to recover from appellants damages allegedly caused thereby (or by the appointment), upon the allegation that the charges made in the order of appointment were knowingly false.

2) Whether an action for such relief is barred by failure to exhaust the administrative remedy.

3) Whether the findings made by the Federal Home Loan Bank Administration in issuing the orders of March 29, 1946, which dissolved the Los Angeles Bank, are subject to judicial review.

4) Whether either the former Bank of Los Angeles or its association members have any standing to question the validity of the orders of March 29, 1946.

5) Whether the members of the Home Loan Bank Board are indispensable parties defendant to an action to set aside the orders of March 29, 1946.

6) Whether out-of-state service in the consolidated actions may be made on the members of the Home Loan Bank Board and other non-resident appellants under either Section 1655 or Section 2361 of Title 28 U.S.C., and whether either section authorizes an injunction, an award of money damages, or other judgment *in personam* against said appellants.

7) Whether there is any basis in the record for the is-

suance of an injunction to restrain the holding of an administrative hearing pursuant to Board Order No. 2015.⁵

SPECIFICATIONS OF ERRORS TO BE URGED

The District Court erred:

1. In issuing its order enjoining the Home Loan Bank Board from conducting an administrative hearing pursuant to Board Order No. 2015 or from initiating any other proceeding as defined in said order, and enjoining all parties to the proceeding below from participating therein.

2. In holding that it had jurisdiction over the subject matter of the complaints and cross-claims, and of the parties thereto, in the consolidated actions in which the injunction was issued.

3. In holding that an action may be maintained to set aside each and every act of the Conservator performed before the termination of his appointment.

4. In failing to hold that an action to obtain such relief is barred by failure to exhaust the administrative remedy.

5. In failing to hold that the order appointing the Conservator is not subject to judicial review on any of the alleged grounds in the consolidated actions or that, if it is, the order is valid.

6. In failing to hold that the orders of March 29, 1946, which dissolved the Los Angeles Bank, are not subject to judicial review.

7. In failing to hold that neither the former Los Angeles

⁵ Subsidiary questions presented are:

8) Whether the order of the Federal Home Loan Bank Administration of May 20, 1946, appointing the Conservator, is subject to judicial review on any of the grounds alleged in the Mallonee action, and, if so, whether the order is valid as a matter of law on the admitted facts.

9) Whether the complaints or cross-claims in the consolidated actions contain any allegations negating the presumed existence of facts sufficient to warrant the findings made by the Administration in issuing the orders of March 29, 1946.

10) Whether the consolidated actions, insofar as they seek to set aside the orders of March 29, 1946, as well as certain so-called cross-claims in interpleader or petitions in the nature thereof, are unconsented suits against the United States.

Bank nor its association members have any standing to question the validity of the orders of March 29, 1946.

8. In failing to hold that the members of the Home Loan Bank Board are indispensable parties defendant to an action to set aside the orders of March 29, 1946.

9. In failing to hold that the consolidated actions, and complaints and cross-claims therein, constitute unconsented suits against the United States.

10. In holding that the Administrative Procedure Act confers jurisdiction to review the order of May 20, 1946, appointing the Conservator and the orders of March 29, 1946, which dissolved the Los Angeles Bank.

11. In holding that an administrative hearing, pursuant to Board Order No. 2015, or the initiation of any other proceeding as defined in the decree of injunction, would interfere with the District Court's asserted jurisdiction in the consolidated actions.

12. In holding that Sections 1655 and 2361 of Title 28 U.S.C. authorize out-of-state service on the members of the Home Loan Bank Board and on other non-resident appellants and the entry of a judgment *in personam* against said appellants, awarding money damages, setting aside each and every act of the Conservator, and subjecting them to a decree of injunction.

13. In entering its findings of fact and conclusions of law, other than findings 4-8, 10-14, 16, 17, 19, 20, 24-29, 44, 58, 73, 76, and (insofar as it concerns the termination of the conservatorship) 78, in that said findings and conclusions other than those specified by number, are without any support in the evidence or are erroneous as a matter of law.

14. In entering its findings of fact, 62, in that none of the orders entered in the consolidated actions are *res judicata* or the law of the case on any material issue.

15. In failing to receive in evidence the appellants' Exhibits A, B, and C (R. 11045-11048, 11052-11055, 11059, 11076).

16. In excluding counsel for appellants from the hearing held on November 11, 1949.

STATUTES, REGULATIONS, AND ADMINISTRATIVE ORDERS HEREIN INVOLVED

The pertinent statutes, regulations, and orders herein involved are set forth in Appendices A, B, and C, respectively, *infra*, pp. 114 to 180. A brief summary of the statutes and regulations and the Federal Home Loan Bank System created thereby is here set forth for the convenience of the court.

THE FEDERAL HOME LOAN BANKS

Under Section 3 of the Federal Home Loan Bank Act, as amended (12 U.S.C. 1423), the Home Loan Bank Board, constituted under Section 17 of the Act, is required to divide the United States into not less than eight nor more than twelve districts, with due regard to the "convenience and customary course of business of institutions eligible to and likely to subscribe for stock of a Bank"; the districts thus created may be readjusted, and new districts may from time to time be created by the Board, not to exceed twelve in all; and the Board is required to establish in each district one Federal Home Loan Bank whose title includes the name of the city in which it is located.

Under Section 4 of the Act (12 U.S.C. 1424), savings and home-financing institutions throughout the United States are eligible for membership in one of the Federal Home Loan Banks.

Section 6 of the Act (12 U.S.C. 1426) makes provision for subscription to the capital stock of each Bank by members and, as to all stock not subscribed for by members, by the United States, with further provision for retirement of the capital subscribed by the Government after the amount paid in by members equals that paid in by the United States.

The management and financial operations of each of the Banks are subject to the close supervision and direction of the Home Loan Bank Board. Under Section 7 of the Act (12 U.S.C. 1427), four of the twelve directors of each Bank are appointed by the Board. The remaining eight directors of the Bank, divided into four categories of two each, are elected under the supervision of the Board. Two

of these eight directors are elected at large by all member financial institutions casting one vote each; the others are elected by member institutions divided into three size groups, each entitled to elect two directors. Voting has no relationship to the amount of stock owned.

In the Eleventh, as in the former Twelfth, District, each state must be represented by at least one elective director (see, *infra*, p. 99); by virtue of Board Order No. 5082, the States of Arizona and Nevada together constitute one state for this purpose. As the readjusted Eleventh District includes nine states, neither the State of California nor any other state may have more than one elective director consistently with the rights of the other states. The former Twelfth District contained only three states (App. C, *infra*, p. 171).

Eligible institutions may become members of, or apply for advances from, only the Federal Home Loan Bank of the District in which is located the institution's principal place of business or, with the approval of the Board, the Bank of an adjoining District (Sec. 4(b), 12 U.S.C. 1424). The Bank may deny such application or, subject to the approval of the Board, grant it on such conditions as the Bank may prescribe (12 U.S.C. 1429;).

Under Section 11 of the Act (12 U.S.C. 1431) the funds which the regional reserve banks make available to their respective members are obtained principally from the proceeds of obligations issued by the Board, which obligations become the joint and several obligations of each Bank regardless of whether or not that Bank consents to the issue. The Board may require any Federal Home Loan Bank, when in the Board's judgment an emergency exists, on such terms and conditions as the Board prescribes, to rediscount notes of members held by another District Bank, or to lend to or make deposits with such other Bank, or to purchase obligations of the other Bank (12 U.S.C. 1431(f)).

Under Section 12 of the Act (12 U.S.C. 1432), the selection, employment, and compensation of all officers, employees, attorneys and agents of each of these regional Banks are subject to the approval of the Board, and all powers

granted to each Bank are exercised and enjoyed "subject to the approval of the Board".

Provision is also made for dissolution of any Bank, should the Board determine such Bank is not required to carry out the purposes of the Act. Under Section 25 of the Act (12 U.S.C. 1445), each Federal Home Loan Bank is given succession "until dissolved by the Board" or by further Act of Congress. Under Section 26 (12 U.S.C. 1446), "whenever the board finds that the efficient and economical accomplishment of the purposes of this Act will be aided by such action," it may "liquidate or reorganize" any Bank and in the case of any such reorganization, any other District Bank may, with the approval of the Board, acquire the assets of any such liquidated Bank and assume the liability thereof, in whole or in part.

FEDERAL SAVINGS AND LOAN ASSOCIATIONS

In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, by Section 5 of the Home Owners' Loan Act of 1933, as amended (12 U.S.C. 1464), to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States. The Secretary of the Treasury and the Home Owners' Loan Corporation are authorized and directed to invest in shares (savings accounts) of any association, as directed by the Board, in an amount up to 75% of the total investment by the Secretary or the corporation and the other shareholders in such association. (Secs. 4(n), 5(j), 12 U.S.C. 1463(n) and 1464(j)). Section 5(d) of the Act (12 U.S.C. 1464(d)) provides that the Board shall have full power to provide in its rules and regulations for "the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the

same; and to release any such association from such control and permit its further operation.”

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

It is the duty of the defendant Federal Savings and Loan Insurance Corporation under Title IV of the National Housing Act, as amended (12 U.S.C. 1724-1730; App. A, *infra*, p. 133), to insure the share accounts of all Federal savings and loan associations. The Federal Savings and Loan Insurance Corporation may and does also insure certain accounts of selected State-chartered savings and loan associations.

SUMMARY OF ARGUMENT

The injunction should be reversed because the complaints and cross-claims in the consolidated actions in which it was issued state no claim for relief within the jurisdiction of the Federal courts, as well as because of the absence of the necessary bases for the issuance of a preliminary injunction. On appeal from a preliminary injunction “the jurisdiction of the court below,” the “equity of the complaint, the relief granted and all other issues are before” the appellate court. *Orth v. Transit Inv. Corporation*, 132 F. 2d 938, 944 (3d Cir.); see *Deckert v. Independence Shares Corp.*, 311 U. S. 282, 287.

I

None of the matters remaining for determination in the Mallonee action, insofar as the action relates to the validity of the conservatorship, constitute a claim for relief within the jurisdiction of the court below. The remaining objects of the Mallonee action, following the termination of the Conservator’s appointment in 1948, are to nullify each and every act of the Conservator and to recover damages allegedly caused thereby or by his appointment. The action is plainly not maintainable for such purpose.

A. The Federal Home Loan Bank Administration was duly vested with jurisdiction to determine whether a Conservator should be appointed. *Fahey v. Mallonee*, 332 U. S. 245; *Adams v. Nagle*, 303 U. S. 532. The order appointing the Conservator was therefore valid until duly set aside,

and cannot be questioned on any ground, including “fraud”, by a collateral attack on the individual transactions of the Conservator in the operation of the Association. The order of appointment can be challenged, if at all, only in litigation directly attacking the order of appointment, and it would be “intolerable” if “every” action of the Conservator could be suspended to “await the outcome of [that] litigation.” *Adams v. Nagle*, 303 U. S. 532, 540, 544. On the termination of the appointment no action is maintainable, moreover, to recover damages allegedly caused by the appointment or by the Conservator’s operations, even though it is claimed that the appointment was made on grounds “knowingly false”. For “it is impossible to know whether the claim is well founded until the case has been tried, and * * * to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties”. *Gregoire v. Biddle*, 177 F. 2d 579, 581 (2d Cir.). The further relief demanded, the invalidation of the loan from the San Francisco Bank and other business transactions of the Association during the conservatorship, calculated as it is to dissuade any central bank or private party from dealing with a conservator pending litigation testing the validity of the appointment, is an “intolerable” interference with the policy of the Home Owners’ Loan Act. *Adams v. Nagle*, *supra*.

B. The Mallonee action is not maintainable to obtain such relief for the further reason that the Association and its shareholders failed to exhaust their administrative remedies. The Board’s regulations provided for an administrative hearing to determine whether the Conservator should have been appointed or should be continued in office. The plaintiffs first procured the injunction and thereafter the deferment of the administrative hearing throughout the nineteen months of the conservatorship. They cannot now be heard to complain of any injury allegedly caused by the appointment of the Conservator or his operations. The administrative remedy, though provided by regulation

rather than by statute, must first be exhausted because the need for resorting to the courts might thereby be obviated and because the question whether there was cause for appointing or continuing a conservator in office is initially for administrative decision and not for the independent determination of the courts. "To hold otherwise would be in effect to substitute the determination of the court for the determination which * * * should be made by" the administrative agency. *Red River Broadcasting Co. v. Federal C. Commission*, 98 F. 2d 282, 287.

The fact that the Conservator was appointed in advance of an administrative hearing provides no excuse for failure to exhaust the administrative remedy. A temporary conservatorship pending hearing on the Board's charges was validly authorized to insure interim protection to the Association, and may not, therefore, be stayed. *Fahey v. Maloney*, 332 U.S. 245, 257; *Yakus v. United States*, 321 U.S. 414, 439-441. Moreover, any damages alleged were susceptible of administrative correction. *Utley v. St. Petersburg*, 292 U.S. 106, 109; *Lichter v. United States*, 334 U.S. 742, 793-4.

C. The order appointing the Conservator is not subject to judicial review on any of the grounds alleged in the complaint but if subject to such review, is valid as a matter of law on the admitted facts. In appointing the Conservator the Administration charged, and the plaintiffs admit, that the directors of the Association had attempted to convert their share accounts into 21,000 one-dollar shares, approximately 10% of the maximum potential votes of members, sufficient to exercise practical voting control and to perpetuate themselves in office. These acts were in plain violation of the directors' fiduciary obligations, as well as of the provisions of the Association's Charter.

The Administration also charged that the directors had by resolution voted the appropriation of \$100,000 of the Association's funds to defend against supervisory action a resolution admittedly intended to defend against the appointment of a Conservator because of allegedly unwarranted charges of misconduct by the Association's management. The appropriation of the Associa-

tion's funds to defend against such charges of personal misconduct by the Association's management was wholly illegal.

These two charges alone warranted the Conservator's appointment. Whether the other grounds assigned in the order of appointment were supported in fact or were known to be without foundation is immaterial. For "if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it". *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 145.

D. The action in any event is clearly not maintainable against the members of the Home Loan Bank Board and the other non-resident appellants who were not personally served in the State of California. Even when originally instituted to secure the removal of the Conservator and the return of the Association's assets to the Association's private management, the Mallonee action was not one to enforce a claim to specific local property or otherwise within the coverage of Section 1655 of Title 28 U.S.C. so as to authorize out-of-state service on non-residents. Certainly that section, however, does not authorize any judgment *in personam*, following the termination of the conservatorship, against non-residents thus served, whether for money damages, to nullify contracts previously entered into during the conservatorship, or for other personal relief.

Nor can authority to enter judgment against the non-resident defendants be derived from Sections 1335 or 2361 of Title 28 U.S.C. These sections authorize out-of-state service on non-residents in certain interpleader actions, within the limitations therein defined, but none of the so-called cross-claims or petitions in the nature of interpleader in the Mallonee action possess the requisites prescribed by Sections 1335 and 2361 for out-of-state service. None of the cross-claims or petitions state a claim in interpleader. The Board members, moreover, are in no event "adverse claimants" within the meaning of the interpleader statutes, but if they are, their claims, if any, are asserted in their official capacities only and the interpleader actions are therefore unconsented suits against the United States. Con-

sent to such suit has not been given by the Administrative Procedure Act.

II

Both the complaint in the Los Angeles case and the complaint and Association cross-claim in the Mallonee action challenge the validity of the orders of March 29, 1946, which, *inter alia*, dissolved the Los Angeles Bank and transferred its assets to the San Francisco Bank. The allegations of the consolidated actions insofar as they relate to the orders of March 29, 1946, however, fail to state a claim, in this aspect, within the jurisdiction of the court below.

A. The orders were entered on a finding made under Section 26 of the Federal Home Loan Bank Act that the "efficient and economical accomplishment of the purposes of this Act will be aided by such action". This finding is not subject to judicial review. The Act makes no provision for such review, and, as the economic and other intangible factors which must be considered in making such findings are "not entirely susceptible of proof or disproof" (*Williamsport Wire Rope Co. v. United States*, 277 U.S. 551, 559) and "involve large elements of prophecy" (*Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111), the Congress presumably intended to commit the determination to the sole and final discretion of the Board.

B. Neither the former Los Angeles Bank nor its association members have any standing to question the validity of the orders of March 29, 1946. The Federal Home Loan Bank Act, under which the Los Angeles Bank was created, expressly provides that Banks chartered thereunder should have succession "until dissolved by the Board" (Section 25) and authorizes the liquidation of any Bank "whenever the Board finds" that the "efficient and economical accomplishment of the purposes of this Act will be aided by such action" (Section 26). These provisions and the purposes of the Act plainly indicate that the corporate existence conferred on the Bank was not intended "to create a statutory privilege protected by judicial remedies". *Stark v. Wickard*, 321 U.S. 288, 300.

C. The Home Loan Bank Board members are indispensable parties to the granting of the relief prayed in the Los Angeles action and, insofar as it relates to the orders of March 29, 1946, in the Mallonee action. In the view most favorable to the Los Angeles Bank, the present action is one to continue in force a contract—the charter issued by the Board to the Bank—an action which cannot be maintained in the absence of one party to the contract. The Board is an indispensable party for the further reason that the Banks created under the Act can act only “with the approval of the Board”, and the Los Angeles Bank cannot, therefore, secure the return of the assets previously transferred to the San Francisco Bank or resume its operations without the Board’s affirmative approval. The relief sought, therefore, could not be granted save by an order directed against the Board members. *Daggs v. Klein*, 169 F. 2d 174 (9th Cir.).

The Board members have not been duly served. The action to continue in force an alleged contract, the charter of the Los Angeles Bank, is not maintainable under Section 1655 of Title 28 U.S.C. against non-residents not personally served, and in no event at the claimed domicile of the obligee, the Los Angeles Bank. Moreover, that section certainly does not authorize a judgment *in personam* against the non-resident Board members directing them to approve the return of assets to the Los Angeles Bank and the resumption of the Bank’s operations.

D. The action is also an unconsented suit against the United States for the further reason that the relief prayed for requires affirmative action by the Board to approve the resumption of operation by the Los Angeles Bank. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682. This conclusion is unaffected by the Administrative Procedure Act which, in general, was intended to codify the long established rules as to the scope of judicial review and was never intended to abrogate the historic immunity of the United States from unconsented suit.

III

The injunction should not have issued, regardless of whether the court below had jurisdiction of the subject matter and the parties to the consolidated actions in which the injunction was issued. Whatever may be said of the relief demanded in the consolidated actions, an injunction to restrain the Home Loan Bank Board members from conducting a hearing is strictly *in personam* and may not be issued in the absence of personal service on the Board members sought to be restrained. *Chase Nat. Bank v. Norwalk*, 291 U.S. 431, 435, 436-8; *Scott v. Donald*, 165 U.S. 107, 117. Further, the issuance of the injunction was erroneous because the proposed Board hearing and the objects thereof were not the same as those of the consolidated actions and the conduct of the administrative hearing therefore could in no wise interfere with the asserted jurisdiction of the court below in the consolidated actions (*Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 447; *Long v. Stites*, 63 F. 2d 855); because the court below improperly assumed supervisory powers of Federal savings and loan associations reserved to the Home Loan Bank Board; and because there is no showing of any irreparable injury to the appellees. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

ARGUMENT

The Mallonee action, insofar as it relates to the validity of the Conservator's appointment, should be dismissed, as we show in Point I. The consolidated actions, insofar as they relate to the validity of the orders of March 29, 1946, which dissolved the Los Angeles Bank, should also be dismissed, as we show in Point II.

The injunction on appeal must accordingly be reversed for the reason that neither the complaints nor the cross-claims in the consolidated actions in which the injunction was issued may be maintained. A preliminary injunction may not stand if the action in which the injunction was issued is itself not maintainable. On appeal from a preliminary injunction, "the jurisdiction of the court below,"

the “equity of the complaint, the relief granted and all other issues are before” the appellate court. *Orth v. Transit Inv. Corporation*, 132 F. 2d 938, 944 (3d Cir); *Re Tampa Suburban R. Co.*, 168 U. S. 583; *Meccano v. Wanamaker*, 253 U. S. 136; *Deckert v. Independence Shares Corp.*, 311 U. S. 282; *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.*, 185 Fed. 365 (9th Cir.).

In addition to the foregoing, the injunction should be reversed because of the absence of the necessary bases for the issuance of an interlocutory injunction, as we show in *infra*, Point III.

I

The Allegations of the Mallonee Action, Insofar as They Relate to the Validity of the Conservator’s Appointment, Do Not State a Claim for Relief Within the Jurisdiction of the Court Below.

Prior to the termination of the conservatorship, the Mallonee action sought: first, to remove the Conservator; second, to obtain a “detailed” statement or accounting of the assets of the Association turned over to the Conservator on his appointment, and of the transactions of the Association in such assets during the conservatorship; third, to declare null and void each and every business dealing of the Association during the conservatorship, particularly the loan from the San Francisco Bank and the pledge of notes and trust deeds of Association as security therefor; and finally, to obtain either the return of the Association’s assets transferred to others during the conservatorship or money damages for the alleged conversion thereof.

The first of these objectives is no longer a matter in controversy. By Order No. 388 (App. C, *infra* p. 177) (R. 3404), dated January 17, 1948, the Home Loan Bank Board provided for the termination of the appointment of the Conservator and by order entered on January 23, 1948, the Conservator was removed by the court below (R. 8310). The order of January 23, 1948, insofar as it terminated the

conservatorship, was final, and, no appeal having been filed within the time allowed, the propriety thereof is no longer open for consideration.⁴

The short answer to the remaining claims for relief is that all are barred because of the Association's failure to exhaust its administrative remedy, as we show in Point I, B below (see *infra*, p. 54), and because the order appointing the Conservator is not subject to judicial review on any of the grounds alleged, but if subject to such review, is valid as a matter of law on the admitted facts, as we show in Point I, C below (see *infra*, p. 59).

In the circumstances of this case, however, there is another and even more fundamental objection to the Association's remaining claims. As we show in Point I, A (see *infra*, p. 36), the validity of a Conservator's appointment cannot be questioned on any ground, including "fraud," by a collateral attack on the individual transactions of the Conservator in the operation of an Association. For related reasons of policy, as we show in Point I, A, 2 (*infra* p. 42), no action is maintainable to recover damages allegedly caused by the appointment or by the Conservator's operations. Granting of the further relief

⁴ The court order of January 23, 1948, which transferred the management to the former directors of the Association, was entered in a collateral proceeding on a petition for "an order of Court approving, confirming and interpreting" Board Order No. 388. (R. 10304) Accordingly, the court order transferring management and terminating the conservatorship effective January 24, 1948, was final and appealable when entered on January 23, 1948, although the accompanying order for an accounting was interlocutory. *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120; *Bank of Lewisburg v. Sheffey*, 140 U. S. 445. As Mr. Justice Frankfurter stated in *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68:

" * * * For related reasons, an order decreeing immediate transfer of possession of physical property is final for purposes of review even though an accounting for profits is to follow. In such cases the accounting is deemed a severed controversy and not part of the main case. * * * "

demand, the invalidation of the loan from the San Francisco Bank and other business transactions of the Association during the conservatorship would likewise be an "intolerable" interference with the policy of the Home Owners' Loan Act, as shown in Point I, A, 3 (*infra*, p. 50). *Adams v. Nagle*, 303 M.S. 532, 540.

These principles were consistently disregarded in the court below, first by the successive filing of a multitude of collateral proceedings, thereby impeding the proper operation of the Association during the conservatorship, and ultimately rendering its continuance a practical impossibility, and secondly, after the termination of the Conservator's appointment, by harassing the Government defendants in a succession of additional ancillary proceedings and by confronting them with enormous damage claims, as a means of inducing the Government to acquiesce in a "compromise" awarding large financial concessions to the Association.

As to the nonresident defendants, Fahey, the substituted Home Loan Bank Board members and the Federal Savings and Loan Insurance Corporation, there is another equally fatal objection, namely, that the court below lacked jurisdiction over their persons, as we show in Point I, D, (*infra*, p. 71).

A

THE ORDER APPOINTING THE CONSERVATOR IS VALID UNTIL DULY SET ASIDE, AND MAY NOT BE QUESTIONED IN COLLATERAL PROCEEDINGS ATTACKING THE INDIVIDUAL TRANSACTIONS OF THE CONSERVATOR PENDING THE DETERMINATION OF THE VALIDITY OF THE APPOINTMENT; ON TERMINATION OF THE CONSERVATORSHIP NO ACTION IS MAINTAINABLE TO INVALIDATE SUCH INDIVIDUAL TRANSACTIONS OR TO RECOVER DAMAGES ALLEGEDLY CAUSED BY THE APPOINTMENT OR OPERATIONS THEREUNDER

1. *The order appointing the Conservator is valid until duly set aside, and may not be questioned in collateral proceedings attacking the individual transactions of the Con-*

servator pending the determination of the validity of the appointment.

The order of appointment was made within the scope of the Commissioner's official authority. The Home Loan Bank Board was duly invested by Congress with jurisdiction to decide whether a Conservator should be appointed. Section 5(d) of the Home Owners' Loan Act of 1933 (12 U. S. C. 1464 (d)) provides:

“The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.”

On May 20, 1946, the date of the Conservator's appointment, the authority thus conferred was duly vested by virtue of Executive Order No. 9070 (App. A, *infra*, p. 140) in the Federal Home Loan Bank Administration, of which the defendant John H. Fahey was at all times Commissioner. Regulations governing the appointment of the Conservator were duly issued by the Commissioner from time to time. 8 Fed. Reg. 1182; 11 Fed. Reg. 5473. In *Fahey v. Mallonee*, 332 U. S. 245, the Supreme Court sustained the validity of the statute and the regulations issued pursuant thereto, a decision which “settled” the “status” of defendant Ammann as Conservator. *Ex parte Fahey*, 332 U. S. 258.

Having thus been issued on a determination made pursuant to valid statutory authority, the order of May 20, 1946, appointing the Conservator was not void *ab initio* but was valid and enforceable until duly set aside or terminated. Administrative orders issued in the exercise of such authority are valid until “set aside” in an “appropriate judicial proceeding” or terminated by “subsequent order” of the administrative agency. *United States v. Corrick*, 298 U. S. 435, 440; *United States v.*

Vacuum Oil Co., 158 Fed. 536 (D. C. W. D. N. Y.) and *Lehigh Valley R. Co. v. United States*, 188 Fed. 879 (3d Cir.) both approved in *Yakus v. United States*, 321 U. S. 414; *Falbo v. United States*, 320 U. S. 549, 553; *Ex parte Romano*, 251 Fed. 762, 764 (D. C. Mass.). Such is the rule specifically applicable to orders of the Comptroller of the Currency appointing receivers of national banks and, by analogy, to appointments of conservators under the Home Owners' Loan Act of 1933. *Adams v. Nagle*, 303 U. S. 532. On the authority of *Adams v. Nagle*, the Supreme Court recently "rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so" *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 695. Save for the two day interval between the order of the three-judge District Court entered September 30, 1946, (R. 743) and the operation of the stay thereof on October 2, 1946, (R. 762) pending appeal to the Supreme Court, the order appointing the Conservator was never set aside until terminated pursuant to Board Order No. 388 of January 17, 1948.

Where orders appointing a Conservator are concerned, moreover, the "appropriate proceedings" to contest the validity of the order are narrowly circumscribed to prevent an "intolerable" conflict with the policy of the applicable legislation. *Adams v. Nagle*, *supra*. The Conservator's authority with respect to any individual transaction may not be attacked on any ground, including "fraud," pending the outcome of litigation concerning the validity of the Conservator's appointment. Such attacks on individual transactions are deemed "collateral" and not maintainable. *Adams v. Nagle*, *supra*.

In *Adams v. Nagle*, *supra*, stockholders sued to enjoin the receiver of two national banks from enforcing assessments ordered by the Comptroller of the Currency. The complaints accused the Comptroller of the Currency of arbitrary conduct and fraud in directing that transfers under a bank consolidation be disregarded and in appointing the receiver, all without hearing. The Court held that the

Comptroller's decision appointing the receiver could not be attacked in a collateral proceeding and that the appointment was valid and enforceable until duly set aside.

In his opinion, Mr. Justice Roberts stated (303 U. S. at 540, 544) :

“In establishing the national banking system Congress has invested the Comptroller, an administrative officer, with jurisdiction to appoint a receiver after investigation and a finding that a bank has become insolvent, and to order an assessment up to one hundred per cent of the par value of the stock against the shareholders to pay creditors' claims if, upon an investigation, he finds that the assets are insufficient to pay the debts. Plainly these are questions for the exercise of administrative discretion. The necessity for vesting this power in an administrative officer springs from the *desirability of prompt liquidation*. It would be *intolerable* if the Comptroller's decision could be *attacked collaterally in every* suit by a receiver against the shareholders to collect the amount of the assessment. It is settled this cannot be done. * * *

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“*If the Comptroller's decision with respect to the contract of February 17 was erroneous as matter of law the stockholders may or may not have a remedy. But their remedy is not to attack, or seek to evade payment of, the assessment. The collection of the assessment cannot be made to await the outcome of litigation of that question. * * **” (Italics supplied)

The decision in *Adams v. Nagle*, *supra*, merely reaffirmed the settled doctrine in the Federal Courts. *Kennedy v. Gibson*, 8 Wall. 498, 505; *Casey v. Galli*, 94 U. S. 673, 681. The decisions of the Comptroller of the Currency, it has consistently been held, are “impervious to collateral attack” on any ground. *Deweese v. Smith*, 106 Fed. 438, 445 (8th Cir.); *Myers v. Coffey*, 124 F. 2d 396 (6th Cir.); *Barbour v. Thomas*, 86 F. 2d 510 (6th Cir.);

Schram v. Schwartz, 68 F. 2d 699, 702 (2d Cir.); *First Nat. Bank v. Murray*, 212 Fed. 140 (8th Cir.); *United States Nat. Bank of La Grande v. Pole*, 2 F. Supp. 153, 157 (D. C. Oreg.).⁵

The prohibition against collateral attack on orders of the Comptroller of the Currency, is not founded on any mechanical formula. As has aptly been stated, where administrative orders are concerned "A collateral attack can be defined only empirically, namely, as an attempt to impeach an administrative decision on grounds which, under the applicable judge-made * * * law, cannot be relied on for this purpose in the particular proceeding." 42 Am. Jur. 519. Attacks on the validity of the Comptroller's decisions in "every suit by a receiver" have been held "collateral", and hence not permissible, because such attacks would defeat the statutory policy of "prompt liquidation". *Adams v. Nagle*, 303 U. S. at 540.

In the light of the policy of the Home Owners' Loan Act of 1933, like attacks on individual transactions of the Conservator before his appointment is terminated or duly set aside, must likewise be deemed "collateral" and not maintainable. The policy of this Act, insofar as it authorizes the appointment of a "conservator", is to make possible the continued operation of an Association as a going concern pending the correction of the conditions which prompted the appointment of the Conservator. In the light of this policy, it is obviously "intolerable"

⁵ In the *Deweese* case, the court said (*loc. cit. supra*) that decisions of the Comptroller are "impervious to collateral attack, and open to avoidance by the court only in a direct attack upon them on the grounds of clear error of law, fraud, or mistake." These grounds for "direct attack" are "too broad" (see *Adams v. Nagle*, *supra* at 541; see Point I, C, *infra*, p. 59), but the prohibition against "collateral attack" was expressly approved in *Adams v. Nagle*. In the *Pole* case, the court said that such decisions are "not subject to collateral attack under any circumstances" (2 F. Supp. 153, 157). In *Davis Trust Co. v. Hardee*, 85 F. (2d) 571, 573 (D.C. Cir.), the court held that the decision of the Comptroller is "final, and is not subject to collateral attack or open to review except for fraud."

that the Conservator be required to litigate his authority in connection with every business transaction of the Association pending the outcome of litigation testing the validity of his appointment. *Adams v. Nagle, supra.*

Such, however, was precisely the object and effect of the Mallonee action and the ancillary proceedings entertained therein. The essence of the Mallonee action is the complaint that the appointment of the Conservator, while seemingly valid, was the result of an underlying secret fraud. But this complaint is not made in a suit directed solely at the legality of the appointment; it is made by the Title Service Company questioning the Conservator's demand for a re-conveyance of title (R. 43); by Wallis asserting a claim to a check (R. 86); by Turner, holding property owned by the Association, under a lease which the Conservator sought to terminate (R. 3961); in a suit by the Association against the Insurance Corporation over the amount of premiums due to the latter (R. 6466, 6473, 6663-6686, 6759-6790); and in an attempt to draw in question loans secured from the San Francisco Bank and the pledge of collateral therefor, solely on the ground that the Conservator had no valid appointment from the Board. For this consequential injury, the Association now seeks huge damages. On account of the litigation they have created, the Association refuses to pay insurance premiums due to the Federal Savings and Loan Insurance Corporation,⁶ and claims an inability to report on the condition of the Association, as required by law. The District Court has not only entertained these claims; it has granted interim relief upon the basis of these claims, including the impound of the final payments due on mortgages (R. 2861 e. g.), and the imposition of the intervention procedure to re-convey property (R. 2519 e. g.); the impound of the collateral for the San Francisco Bank loan (R. 8194), and the issuance of the preliminary injunction involved in this appeal. The impound of mortgage pay-

⁶ As above set forth (*supra*, p. 18) the Association has paid certain sums into the court in an attempt to interplead the Association's shareholders and the Insurance Corporation.

ments paralyzed the conservatorship, the impound of collateral has embarrassed the Bank, and the injunction order has ousted the Board of its statutory powers.

The claims and demands thus asserted in the Mallonee action are predicated, and could only be predicated, on the avowed theory that each and every act of the Conservator was “void, *ab initio*” (R. 3079, 3321). As this theory is plainly erroneous, all the remaining claims for damages and other relief are plainly without basis in law, and for this reason and those set forth in the succeeding sections, should be dismissed.

2. *No action may be maintained upon the termination of the Conservator's appointment for damages allegedly caused by the appointment or operations thereunder, even though the appointment was allegedly made on grounds knowingly false and solely to injure the Association.*

The considerations of policy underlying the rule of *Adams v. Nagle*, *supra* (303 U. S. 532), which forbids an attack on the individual acts of a receiver or conservator in operation of a financial institution during the period of such receivership or conservatorship, require that no action for damages be entertained after the termination of the appointment based on such acts. No responsible person would accept the appointment and no conservatorship could be administered if every action taken in the course thereof could be thereafter called into question by reason of the alleged malicious state of mind of the administrative authorities, and no surety company would consent to furnish a fidelity bond subject to such risks. *Phelps v. Dawson*, 97 F. 2d 339 (8th Cir.)

A grant of immunity from such liability, indeed, is recognized as necessary for the faithful performance of official duties, not only in the field of banking supervision, but in the administration of Federal laws generally. It is now settled doctrine that no suit for damages may be maintained against administrative officers of the Federal Government

for action taken within the general scope of their authority, though the particular action challenged was clearly erroneous, and was allegedly known to be without basis in law or fact and issued with the sole purpose of injuring the plaintiff. The rule, originally applied to cabinet officers (*Spalding v. Vilas*, 161 U. S. 483, 498), has been extended to all Federal officers authorized to exercise any measure of discretion, including United States Attorneys and their assistants (*Cooper v. O'Connor*, 99 F. 2d 135); (*Gregoire v. Biddle*, 177 F. 2d 579, cert. den., 339 U.S. 949); members of the Securities and Exchange Commission (*Jones v. Kennedy*, 121 F. 2d 40 (D. C. Cir.), cert. den., 314 U. S. 665); members of the Parole Board, wardens of Federal penitentiaries, and the Director of the Bureau of Prisons (*Lang v. Wood*, 92 F. 2d 211, cert. den., 302 U. S. 686); subordinate bureau chiefs *De Arnaud v. Ainsworth*, 24 App. D. C. 167); deputy fire marshals (*Phelps v. Dawson*, 97 F. 2d 339); and specifically to officers of the Home Owners' Loan Corporation, the directors of which are the defendant members of the Home Loan Bank Board (*Adams v. Home Owners' Loan Corporation*, 107 F. 2d 139 (8th Cir.), as well as the Comptroller of the Currency and bank receivers appointed by him (*Cooper v. O'Connor*, 99 F. 2d 135, cert. den. 305 U. S. 643). On principle, the rule extends with equal force to the central banks created by the Board as Federal instrumentalities to exercise the powers prescribed by the Federal Home Loan Bank Act under the Board's direction (12 U.S.C. 1432). See *infra*, p. 97.

Government officers, to be sure, are not immune from suit; their acts are subject to judicial review in proceedings for injunctive or other appropriate relief, though taken on orders of a superior. (*Williams v. Fanning*, 332 U. S. 490, 493). Public policy requires, however, that such officials be given immunity from a claim for money damages and thus encouraged to "act freely and fearlessly in the discharge of their important functions". *Yaselli v. Goff*, 12 F. 2d 396, 406; *Gregoire v. Biddle*, 177 F. 2d 579, 580; *Spalding v. Vilas*, 161 U. S. 483.

In *Spalding v. Vilas*, *supra*, the Supreme Court said (*supra* at 498-499) :

“* * * In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty as Postmaster General. The motive that impelled him to do that of which the plaintiff complains is therefore wholly immaterial.
* * *,”

The justification for the rule, as extended to Federal officers generally, was clearly set forth in *Gregoire v. Biddle*, *supra* at 581, in which Judge Learned Hand observed:

“It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their

duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as *res nova*, we should not hesitate to follow the path laid down in the books.”

The immunity is liberally enforced in conformity with the vital public policy which it serves. Erroneous orders and decisions on matters duly committed to administrative determination cannot be made the basis for money damages, even though the order in controversy was previously set aside on direct judicial review for lack of basis in fact or law,

Jones v. Kennedy, 121 F. 2d 40 (D.C. Cir.) per Judge, now Chief Justice Vinson, cert. den., 314 U. S. 665; *Standard Nut Margarine Co. v. Mellon*, 72 F. 2d 557, cert. den., 293 U. S. 605,

or was based on grounds “knowingly false or wrong”,
Barsky v. United States, 167 F. 2d 241 (D.C. Cir.);
Gregoire v. Biddle, 177 F. 2d 579, (2d Cir.);

or was entered because of “sympathy” with the “political welfare” of a cabinet officer in retaliation for the plaintiffs’ efforts to have such officer removed.

Jones v. Kennedy, *supra* at 42.

The character of the damage alleged is immaterial. The rule of immunity extends to all such damage, whether for defamation of character (*Glass v. Ickes*, 117 F. 2d 273); the deprivation of liberty through false arrest (*Gregoire v. Biddle*, 177 F. 2d 579; *Yaselli v. Goff*, 12 F. 2d 396) or wrongful commitment to prison or an insane asylum (*Brown*

v. *Rudolph*, 25 F. 2d 540; *Lang v. Wood*, 92 F. 2d 211); irreparable damage to the plaintiff's business (*Standard Nut Margarine Co. v. Mellon*, 72 F. 2d 557, 558); or even the destruction of property by "tortious conduct" of alleged "willfulness" or "wantonness" (*Atchley v. Tennessee Valley Authority*, 69 F. Supp. 952, 954, 956); see *Spalding v. Vilas*, 161 U. S. 483. In *Spalding v. Vilas*, *supra*, for example, recovery was denied for inducing breach of contract, and in the *Mellon* case for illegally requiring the plaintiff's dealers either to comply with inapplicable laws or to discontinue the sale of the plaintiff's product. In the *Atchley* case, the Tennessee Valley Authority, though expressly authorized to "sue or be sued", was held immune from liability for flooding private lands, notwithstanding the allegation of "willfulness" and "wantonness", on the authority of *Spalding v. Vilas*, *supra*, *Standard Nut Margarine Co. v. Mellon*, *supra*, and other similar decisions, 69 F. Supp. at p. 956.

Thus, no action for damages is maintainable, either against any officers of the Federal Home Loan Bank Administration or its successor, the Home Loan Bank Board, for appointing a conservator pursuant to findings committed to their determination by valid statutory authority. (*Jones v. Kennedy*, *supra*; *Standard Nut Margarine Co. v. Mellon*, *supra*; *Atchley v. Tennessee Valley Authority*, *supra*), or against a conservator thus appointed for operating an association pursuant to the "lawful" regulations "of the department under whose authority" he was "acting". *Cooper v. O'Connor*, 107 F. (2d) 207, 209, cert. den. 308 U. S. 615.

The rule of immunity from such damage claims applies with equal force to the Federal Home Loan Banks, which are "instrumentalities of the federal government, engaged in the performance of an important governmental function." *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95, 102. The Federal Home Loan Banks are endowed with statutory powers exercised only "with the approval of the [Home Loan Bank] Board" (12 U.S.C. 1432) and in furtherance of the purpose and pol-

icies of the Federal Home Loan Bank Act (12 U.S.C. 1431) and the Home Owners' Loan Act of 1933 (12 U.S.C. 1464). Like other federal instrumentalities, they must be accorded immunity from such damage claims to insure the "fearless" discharge of their "important governmental function". *Gregoire v. Biddle, supra*; *Phelps v. Dawson, supra*; *Atchley v. T.V.A., supra*. Any other rule would render the power conferred on the Banks "impossible to exercise, or would prevent its exercise by the dread of an immeasurable responsibility." *Bedford v. United States*, 192 U. S. 217, 224.

No liability may be imposed in any event where, as here, the Bank is sought to be held accountable in damages merely for respecting the apparent authority of a conservator appointed, not by the Bank, but by the supervisory authority, the Home Loan Bank Board or its predecessor. The conservator's authority in individual transactions cannot be questioned by the Federal Home Loan Banks on any ground, including fraud, prior to the outcome of litigation contesting the validity of the conservator's appointment. *Adams v. Nagel, supra*. Certainly, the Bank cannot be mulcted in damages for honoring an administrative order, the issuance of which does not render the appointing authority itself pecuniarily liable. *Yearsley v. Ross Construction Co.*, 309 U. S. 18, 23.

The Mallonee action is thus not maintainable against any of the appellants for damages allegedly caused by the order appointing the Conservator or the Conservator's operations thereunder. Contrary to appellee's contentions, this conclusion is in nowise affected by the Board Order No. 388 of January, 1948, providing for the termination of the Conservator's appointment. That order contained no finding that the original appointment was erroneous, but even if it had, it would provide no basis for subjecting the appellants to liability in damages. The rule of immunity would apply even though the appointment were subsequently held erroneous on judicial review. *Standard Nut Margarine Co. v. Mellon, supra*; *Jones v. Kennedy, supra*. There is no possible basis for a different rule as-

suming, contrary to fact, that the appointment was terminated because of a subsequent administrative determination that the appointment was initially erroneous.

Nor is there anything in the Board's regulations or orders evidencing any intention to modify or abrogate the judicially-created rule of immunity from such damage claims. The Board Regulations have long required the filing of a "detailed report" and administrative review of the Conservator's "accounts", on the termination of his appointment (Section 207.9, App. B, *infra*, p. 161). No suggestion is or could be made that these Regulations purport to render the Conservator financially liable for any alleged invalidity in the Board order appointing him.

The Board Order No. 388 of January 17, 1948, on which the Association relies, directed the Conservator to furnish an "accounting" in his official, not his individual capacity, and thus required no more than the performance of official duties under existing regulations. The Board's direction to furnish the accounting to the Association's shareholders added nothing to the provisions for full disclosure under the then existing Board regulations.⁷ At all events the order does not even purport to set forth any rule, much less a new one, to measure the Conservator's liability on any transaction disclosed in his accounting. Certainly, no liability could be lawfully imposed for acts done in conformity with the agency's "prior decision" appointing the Conservator (*United States v. Morgan*, 307 U. S. 183, 192) either by a retroactive Board order (*Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370; *United States v. Morgan*, *supra*), or by departure in a "single instance" from the Board's duly prescribed regulations (*United States v. McGrath*, 181 F. 2d 839, 841). Accordingly, no such retroactive construction could be given Order No. 388 in the absence of the "clearest mandate". *Claridge Apts. Co. v. Commissioner of Int. Rev.*, 323 U. S. 141, 164; *Fullerton-Krueger Lumber Co. v. Northern P. R. Co.*, 266 U. S. 435; *United States v. St. Louis, S. F. & T. R. Co.*, 270 U. S. 1;

⁷ All inventories, statements, and reports of a Conservator are available for inspection as the Board may direct. (Reg. Sec. 207.10, App. B, *infra* p. 162).

Hassett v. Welch, 303 U. S. 303; *Transcontinental & West. Air v. Civil Aeronautics Bd.*, 169 F. 2d 893 (D.C. Cir.).⁸

The rule of official immunity from damage actions thus precludes surcharging the Conservator's accounts for any liability based either on the alleged invalidity of the order of appointment or neglect in the performance of his duties (*Lucking v. Delano*, 122 F. 2d 21 (D.C. Cir.)), or for any act other than the use of his official position to make a secret personal monetary gain (*Baker v. Schofield*, 243 U. S. 114), which, of course, is not here alleged.⁹

⁸ The use of the term "rescind" in Board Order No. 388 is of no significance. Even as used with respect to contracts, the term "rescind" may mean merely a termination for the future. *Illges v. Congdon*, 248 Wis. 85, 21 N.W. 2d 647; *Haaser v. A. C. Lehmann Co.*, 130 Conn. 219, 33 A. 2d 135; *George H. Finlay & Co. v. Swirsky*, 98 Conn. 666, 120 Atl. 561, 562-563; *Hurst v. Trow's Printing & Bookbinding Co.*, 2 Misc. Rep. 361, 22 N.Y. Supp. 371. The Board's contemporaneous instruction to defer the termination of the conservatorship until after a new election of directors (R. 10312), while it cannot now be invoked to question the final Court order removing the Conservator, plainly shows that, on the undecided question of the validity of the original order of appointment for alleged misconduct of the Association's management, Order No. 388 was not intended as a vote of confidence in that management.

⁹ As an "officer of the United States," an administrative receiver or conservator is, of course, liable to criminal prosecution for embezzlement or false reports. *Weitzel v. United States*, 274 Fed. 101, cert. den., 257 U.S. 644. See also 18 U.S.C. 657.

Whether, on the basis of the Board's Regulation and Order No. 388, or apart therefrom, an independent judicial proceeding could be brought to compel the Conservator to render a "detailed" report of the Association's operations under his management presents a separate question. (See *Lucking v. Delano*, *supra* at 29). Any issues which might arise in such proceedings as to the completeness of the Conservator's disclosure, it should be noted, would in no event touch the matters set for hearing in the Board order of September 9, 1949, in controversy, or the charges of fraud in the Mallonee action, and would, therefore, provide not the slightest basis either for the maintenance of the Mallonee action or for enjoining the Board hearing.

The conclusive answer to the claim of jurisdiction in such proceedings, however, is that the accounting required by the Board's general regulations contemplates administrative review (Sec. 207.9, App. B, *infra*, p. 161), and not judicial review, which accords with the familiar practice in the case of accounts of receivers of national banks. The Board could not lawfully, and presumably did not intend to make an exception in the "single instance" of the defendant Ammann. See *United States v. McGrath*, 181 F. 2d 839, 841.

3. *No action is maintainable to declare invalid the loan from the San Francisco Bank or any other transaction of the Association during the period of the conservatorship.*

In addition to damages, the Association seeks a judgment declaring that the loan from the San Francisco Bank, in the remaining principal amount of \$6,300,000, is not a binding obligation of the Association, and in general that all commitments and transfers made during the period of the conservatorship were without authority and of no legal force and effect. (R. 4172)

An action for such relief is plainly not maintainable. The validity of the statute and regulations under which the Conservator was appointed is settled (*Fahey v. Mallonee*, *supra*) and the status of the Conservator fixed accordingly. *Ex parte Fahey* 332 U. S. 258. The plaintiffs and the Association themselves allege that the appointment and operations thereunder were done with "color of authority" (R. 2974), and that the alleged illegality appears, not from anything on the face of the order of appointment, but the alleged "fraudulent" motives nowhere recited in the order itself (R-2986). All contracts and other business dealings of private persons with the Association during the conservatorship are therefore protected by the familiar principle regularizing transactions with *de facto* officers. *Cocke v. Halsey*, 16 Pet. 71, 87; *Waite v. Santa Cruz*, 184 U.S. 302; *Norton v. Shelby County*, 118 U. S. 425, 441; *County Court of Ralls County v. United States*, 105 U. S. 733; *Rockingham County v. Luten Bridge Co.*, 35 F. (2d) 301; *United States v. Lindsley*, 148 F. (2d) 22, cert. den., 325 U. S. 835, 66 ALR 735, 742. Indeed, the Association, while it asserts generally that all of the Conservator's transactions were without authority and void (R. 4172), does not make bold to challenge the validity or binding effect of any of the loans made during the conservatorship to individuals borrowing money from the Association to construct or purchase homes. By

implication, the Association recognizes the binding force of these commitments, in tenderin g certain allegedly “im-provident” loans in payment of the loan from the San Francisco Bank to the Association (R. 4175). And, while it is alleged that the Conservator failed to make appropriate endorsements (R. 2993), it is nowhere suggested that bor-rowers should not be credited for any payments of principal or interest made during the conservatorship on loans from the Association. Nor is there any specific contention that the private banks, in which the Association kept its ac-counts, may be charged for the moneys checked out of such accounts during the period of the conservatorship.

Such transactions may, of course, have been entered into by private persons with due regard to their own economic advantage; the Association alleges that the (G.I.) 4% loans were not profitable to the Association, and that re-duction in interest rate of loans made prior to the conserva-torship was an unwarranted concession to the borrowers (R. 4177). The contracts complained of cannot now be set aside, however, any more than contracts or other trans-actions between private parties generally, under the rule regarding dealings with *de facto* officers.

The simple fact is that the complaint and the Association cross-claim, in this aspect, are directed solely at the sub-sidized 2% loan from the Association’s reserve Bank, the Federal Home Loan Bank of San Francisco. The policy of the Home Owners’ Loan Act, however, as well as the rule governing transactions with *de facto* officers, plainly forbids any attack on the transactions between an association during a conservatorship and its reserve Bank, even though it be alleged that the Bank “knew” that the order appointing the conservator was prompted by unlawful motives not apparent on the face of the order. The Banks estab-lished under the Federal Home Loan Bank Act, were created for the very purpose of freely extending to associations, in times of financial crisis in their affairs, credit which could

not be obtained from any private source, and at low interest rates made possible only by the Government's contribution of capital to the banks (75 Cong. Rec. 14453). Such credit obviously could not and would not be made available when most needed if the undertaking of the association to repay the loan and the pledge of collateral to secure the same, could be thereafter denied validity because of a claimed defect in the conservator's authority for reasons nowhere appearing on the face of the order of appointment. The Banks, though they cannot act without the Bank Board's approval in any case (12 U.S.C. 1432), may decline to make a loan to an association in their discretion (12 USC 1430). Indeed, the Association frankly admits that its very object was to prevent the San Francisco Bank from making the loan, and expressly alleges "that the said Long Beach Association and plaintiffs, the Shareholders Protective Committee, have done everything within their power to warn said cross-defendants *and to prevent said cross-defendants from advancing said money to the said A. V. Ammann.*" (R. 4178) (Italics supplied)

The consequences of calling into question the loans made by a reserve Bank to an association pending litigation as to the validity of the conservator's appointment, confirms the conclusion that the maintenance of an action for such purpose may not be permitted. For if the credit of the reserve Bank were thus denied an association, it would be compelled to undertake a forced liquidation to meet its money requirements to pay withdrawals or other demands, with disastrous results to the shareholders, and without, as shown above, any recourse by way of an action for damages against the conservator (see *supra* p. 42). The only alternatives would be to close the association or to make a forced sale of its notes and other assets at distressed prices. It was just such financial disasters which the reserve Banks were created to avoid (75 Cong. Rec. 14458).

The principles confirmed in *Adams v. Nagle, supra*, therefore require that the Banks be permitted to serve their intended function by making advances to associations during a conservatorship, even where it is alleged that the

conservator lacked authority because his appointment was prompted by “malice” or “fraudulent” motives nowhere disclosed on the face of the order. The Banks are bound to acknowledge the conservator’s authority in all individual business transactions connected with the operation of the association, and cannot question his authority in such collateral proceedings on any ground, including “fraud” *Adams v. Nagle, supra*; see *supra* p. 36. Prior to the termination of the Conservator’s appointment, therefore, the San Francisco Bank loan and the pledge of collateral to secure the same were plainly impervious to attack. The same must be true after the termination of the appointment. For if such actions were maintainable, no regional Bank would make a loan pending adjudication of the validity of the conservator’s appointment, with the result that the conservatorship would either have to be terminated and the former management restored in order to permit normal operations, or the conservator would be required to close the association or place it in receivership for liquidation.

What has been said assumes that the complaint and Association cross-claim sufficiently allege that the San Francisco Bank “knew” that the defendant Fahey was prompted by improper motives in appointing the Conservator. The contrary, however, is true. The acts deemed to constitute “fraud” must be alleged with particularity. *Meeker v. Baxter*, 83 F. (2d) 183, 186; see *Chamberlain Machine Works v. United States*, 270 US 347. The acts of the San Francisco Bank in making loans to the Association are, of course, not themselves fraudulent. Nor is there any motive alleged which tainted such acts, otherwise innocent, with fraud of any kind. At most, it is alleged that the Bank acted with “knowledge” (R. 4179) or with “knowledge of the pendency of the present action” (R. 3044) or with “knowledge” of the plaintiffs’ and the Association’s “rights, titles, interest and ownership,” and the “terms and conditions” of the Conservator’s appointment (R. 3086) and of the Conservator’s “lack of authority” (R. 4173).

In fact, the gravamen of the claim against the San Francisco Bank is that it was “entirely and completely dominated” by the defendants Fahey and Ammann (R. 3028) and is liable therefore as the “alter ego” of the latter in disregard of the Bank’s separate corporate entity. A sufficient answer is that, if the Bank were dominated by the appointing authorities, it certainly cannot be held liable in honoring orders for which the appointing agency is not itself pecuniarily liable. *Yearsley v. Ross Construction Co.*, 309 US 18, 23. Moreover, the Federal Home Loan Banks, while they exist only at the will of the Board and may act only with the Board’s approval, are managed during their corporate existence by their own 12 directors, 8 of whom are elected by the member associations of the respective Banks. In these circumstances, the Banks must be treated as legal entities separate from the Home Loan Bank Board and its officers, just as wholly owned government corporations are generally treated as legal entities separate and distinct from the United States itself. *Lynn v. United States*, 110 F. (2d) 586.

B

ALL CLAIMS FOR RELIEF BASED ON THE ALLEGED INVALIDITY OF THE CONSERVATOR’S APPOINTMENT ARE BARRED FOR THE FURTHER REASON THAT THE PLAINTIFF SHAREHOLDERS AND THE ASSOCIATION FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDY

The applicable regulations effective in 1946 then provided, as they now provide, for an administrative hearing on the appointment of a Conservator, at the request of an association, at which the association “may appear and show cause why the Conservator or receiver should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the Conservator or receiver.” (Reg. Sec. 206.2, App. B, *infra*, p. 150) The Association, acting through its board of directors, actually proceeded under this provision and, in May 1946, requested such an administrative hearing (R. 140). But on July 1, 1946, the plaintiffs “nevertheless demanded and obtained an injunction to prevent the administrative hearing” and thus prevented the Home Loan Bank Admin-

istration from the "making of a record" as to whether the charges were "well-founded". *Fahey v. Mallonee*, 332 U.S. at 219 (R. 157, 222, 372). Not only have they refused to exhaust the administrative remedy specifically provided for these cases, but they have fought to prevent the Board from making that remedy available to them.¹⁰

Appellees' complaint should, therefore, have been dismissed under the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540; *Goldsmith v. United States Board of Tax Appeals*, 270 U. S. 117, 123; *Federal Power Comm. v. Arkansas Power & Light Co.*, 330 U. S. 802; 51 Har. L. Rev. 1251, *et seq.*

That the same rule is applicable here requires no extended argument, in view of the decision in *Fahey v. Mallonee*, *supra*, at p. 250. An administrative decision, after hearing, if favorable to the Association, would have obviated any necessity for recourse to the Courts to remove the Conservator. *United States v. Ill. Central R. R. Co.*, 291 U.S. 457, 463; *Myers v. Bethlehem Shipbuilding Corp.*, *supra*; *Macauley v. Waterman Steamship Corp.*, *supra*; *Goldsmith v. United States Board of Tax Appeals*, *supra*; *Federal Power Commission v. Arkansas Power & Light Co.*, *supra*. Even if unfavorable, the hearing would have permitted a preliminary determination by an expert administrative tribunal (*Ill. C. R. Co. v. Interstate Commerce Comm.*, 206 U.S. 441, 454); (*Gt. No. R. Co. v. Merchants Elev. Co.*, 259 U.S. 285, 291), and thus "make a record" on which judicial review, if necessary or appropriate, could properly be based.

¹⁰ Under the terms of Order No. 5309, dated June 5, 1946, which set the administrative hearing, shareholders and other interested parties could intervene in and appear at the hearing (R. 145):

"And it is further ordered that any person, partnership, association, or corporation claiming to have an interest in the subject matter involved may, at any time before the closing of the hearing, file a petition for leave to intervene at said hearing."

Fahey v. Mallonee, *supra* at 256; *National Broadcasting Co. v. United States*, 319 U.S. 190, 227; *Red River Broadcasting Co. v. FCC*, 98 F. 2d, 282, 285, 286 (D.C. Cir.).

That the administrative hearing in this case was provided by lawful regulation rather than by statute is plainly immaterial. *Goldsmith v. United States Board of Tax Appeals*, *supra*; *Red River Broadcasting Co. v. F C C*, *supra*; see *National Broadcasting Co. v. United States*, *loc. cit. supra*. The further objection that a hearing would be futile because of alleged bias and prejudice of the Board was expressly rejected by the Supreme Court in *Fahey v. Mallonee*, *supra*, in which the Court observed, "We cannot agree that a court should assume in advance that an administrative hearing may not be fairly conducted" (332 U. S. at 256).

The fact that the order of appointment was put into effect in advance of hearing affords no basis for an exception to the exhaustion rule. *Fahey v. Mallonee*, *supra*; *Yakus v. United States*, *supra*. The remedy, if any, is to stay enforcement of the order pending administrative hearing, not to secure an independent judicial determination. *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 444-445. To hold otherwise would "substitute the court for the administrative tribunal." *Tagg Bros. & Moorhead v. United States*, *loc. cit. supra*. *Red River Broadcasting Co. v. Federal C. Commission*, 98 F. 2d 282, 287. Even such stay should be denied, however, where the public interest requires, notwithstanding allegations of irreparable injury. *Yakus v. United States*, 321 U. S. at 440-442. And it is now settled that the temporary appointment of a Conservator in advance of hearing is required to protect the Association "in view of the delicate nature of the institution and the impossibility of preserving credit during an investigation" *Fahey v. Mallonee*, *supra* at 253.

Any damages complained of, moreover, were susceptible of administrative correction by "administrative remedy * * * ignored by the objector", *Utley v. St. Petersburg*, 292 U. S. 106, 109-110; *Lichter v. United States*, 334 U. S.

742, 793-794. Such damage allegedly resulted from withdrawals of \$6,000,000 of savings (share capital) shortly after the Conservator's appointment (R. 311, 3220, 3246); a contemporaneous loan of \$7,300,000 from San Francisco Bank (R. 668) secured by a pledge of \$12,000,000 of notes and trust deeds owned by the Association (R. 3224, 3584-6) and some \$8,300,000 of Government bonds previously deposited with the former Los Angeles Bank for "safe keeping" (R. 3751-2, 3582); the payment to the San Francisco Bank of \$1,000,000 of principal in October 1946 (R. 4226-7), and \$201,518.18 of interest (R. 4229), leaving an unpaid balance of \$6,300,000 at 2% interest (R. 4172); and the purchase of shares of stock of the San Francisco Bank in amounts (R. 4219, 4222) which, when coupled with that previously owned by the Association (R. 4224) satisfied the requirements of Section 10(c) of the Federal Home Loan Bank Act for a Bank loan to the Association of \$7,300,000.¹¹

On their face, the Bank loan and pledge of collateral to secure the same resulted in no economic loss to the Association. For the Conservator was thus enabled to pay off the withdrawing savers (shareholders) with the proceeds of a

¹¹ Under Section 10(c) the borrower must purchase stock equal to one-twelfth of the loan.

The Bank loan notes bear dates of June 28, November 20, 22, 24, 1947 (R. 4172); in fact these notes were renewal notes of loans made in 1946 (R. 10445).

It is also alleged that the Association under the Conservator made \$4,000,000 of "improvident" 4% (G.I.) loans (R. 4174), but the Association (which at the time the allegation was made had been restored to its private management for a period of four months) nowhere alleges that any of these loans occurred prior to opportunity for administrative hearing. As appears from the face of the pleadings all transfers of bonds, other than the pledge of the \$8,300,000 of securities, occurred long after opportunity for administrative hearing was afforded (R. 4196, 4199, 4201, 4203).

loan from the San Francisco Bank at an interest rate of 2%, substantially less than the prior dividend rate on the share capital of 2½% to 4% (R. 334), and at the same time, preserve to the Association the full return of principal and interest payments on the mortgage notes. Indeed, the resulting “torts” alleged are purely technical “conversions” (R. 4193 et seq.), based on the fallacious theory that all acts of the Conservator were “void ab initio,” (R. 3079), not accompanied by any actual monetary loss.

If, for any reason, however, the Association preferred to liquidate the loans and release its assets from pledge, the Board, after administrative hearing, and as part of any relief granted, could have directed the investment of public funds as share capital to replace the savings previously withdrawn during the conservatorship, and thus enabled the Association to repay the San Francisco Bank loan and procure the return of all the collateral pledged, without Court order. The Board has possessed such power ever since the establishment of the Federal Savings and Loan System in 1933. Home Owners’ Loan Act of 1933, as amended, Sec. 2(a), 4(a), 4(n), and 5(j), App. A *infra*, p. 129; 12 U. S. C. 1461(a), 1463(a), (n), and 1464(j).

Assuming, however, that there were any occasion to seek judicial relief, exhaustion of the administrative remedy was a necessary prerequisite. Since a full hearing must necessarily precede the removal of the conservator in any event, the hearing should initially be held before the administrative agency, so that subsequent judicial review, if any, may be had on the administrative record, with due regard to the determination of an agency “informed by experience” (*Ill. C. R. Co. v. Interstate Commerce Comm.*, 206 U. S. 441, 445) and acquainted “with the many intricate facts * * * commonly to be found in a body of experts.” *Gt. No. R. Co. v. Merchants Elev. Co.*, 259 U. S. 285, 291. To “hold otherwise would be in effect to substitute the determination of the court for the determination which * * * should be made by” the administrative agency. *Red River Broadcasting*

Co. v. F. C. C., 98 F. 2d, 282, 287; see *Marshall v. Pletz*, 317 U. S. 383, 388; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 444.

An administrative determination, had it been requested and obtained, would have furnished such expert administrative judgment on the propriety of the initial appointment as well as the need, if any, for continuing the conservatorship thereafter. The Board regulations expressly provide that the hearing extend to the question whether “the Conservator * * * should not have been appointed.” (Reg. 206.2 App. (B), *infra* p. 151).

C

THE CLAIMS BASED ON THE ALLEGED INVALIDITY OF THE ORDER APPOINTING THE CONSERVATOR ARE NOT MAINTAINABLE FOR THE FURTHER REASON THAT THE ORDER, IF SUBJECT TO JUDICIAL REVIEW, IS VALID AS A MATTER OF LAW ON THE ADMITTED FACTS, AND BECAUSE SUCH ORDER, MOREOVER, IS NOT OPEN TO REVIEW ON THE GROUNDS ALLEGED IN THE COMPLAINT AND CROSS-CLAIMS.

1. *The order of May 20, 1946, appointing the Conservator, is valid as a matter of law on the admitted facts*

The admitted facts of this case show that prior to the appointment of the Conservator, the management of the Association had been engaged in unlawful acts designed to perpetuate their control of the Association and to remove themselves beyond power of recall by either the shareholders or supervisory authorities. These acts were specifically assigned as grounds for the appointment of the Conservator, and are sufficient as a matter of law to justify the appointment without regard to the sufficiency of other charges set forth in the order of appointment.

The “More Definite Statement” of the grounds for appointing the Conservator, furnished by the Administration at the Association’s request, recites that certain directors of the Association, namely, T. A. Gregory, J. E. Gregory, M. T. Killingsworth and S. I. Bacon, undertook or attempted to convert their shareholdings and other funds, totaling approximately \$21,000, into approximately 21,000 separate

purported share accounts of \$1 each, in violation of the rights of over 16,000 share account holders of said Association, and in violation or attempted violation of their duties as directors. (App. C, *infra*, p. 173) The establishment of such share accounts is expressly admitted in the Association's pleadings (R. 3242).

The "More Definite Statement" also alleges that on May 8, 1946, the Association authorized expenditure of \$100,000 for legal expenses in connection with anticipated litigation with the supervisory authorities, and that a check of \$50,000 was actually disbursed; the Association admits and indeed asserts that such authorization was adopted and that such check was disbursed pursuant thereto to resist the appointment of a Conservator under the very circumstances of this case (R. 3239).

The actions thus admittedly taken by the directors were both in plain violation of their fiduciary obligations as directors and intended to nullify the express charter provisions of the Association. They are themselves sufficient bases for the order appointing the Conservator.

The officers and directors of an Association, even more than those of an ordinary corporation, are trustees, owing a fiduciary duty to the shareholders of the corporation. Federal savings and loan associations are required to be modeled after local mutual thrift institutions in the United States, i.e., building and loan associations and mutual savings banks. Sec. 5(a), Home Owners' Loan Act of 1933, (12 U.S.C. 1464(a)). Such institutions are "quasi-public corporations, chartered to encourage thrift and prompt ownership of homes, with powers and immunities peculiarly their own" (*Hopkins Fed. S. & L. Asso. v. Cleary*, 296 U.S. 315, 328) "and so organized as to attract the savings of persons of modest means." (*People ex rel. Barrett v. Logan County Building & Loan Association*, 369 Ill. 518, 525, 17 N.E. 2d 4). The nature of the operations and the modest financial means of those investing in such organizations has indeed prompted the Courts to characterize them as "savings institutions * * * established solely for charitable purposes," (*Oulton v. German Savings Society*,

17 Wall. 109) or “nonprofit making.” See *Davenport National Bank v. Board of Equalization*, 123 U.S. 83. As the Supreme Judicial Court of Massachusetts observed in *Lowell Co-Operative Bk. v. Co-Operative Central Bk.*, 287 Mass. 338, 191 N. E. 921, 925:

“ * * * These institutions are established wholly for public purposes, are intrusted with large amounts of money belonging to persons who can ill afford to lose it, and who are in no condition to be able to judge of, or provide for, its security. * * * It is a matter of common knowledge that co-operative banks are largely dealt with by persons of small or moderate means as a method of accumulating savings. * * * ”

It is for these reasons that both the Federal Government and the States have commonly provided for close supervision and regulation of the activities of such associations.¹² *Treigle v. Acme Homestead Association*, 297 U.S. 189, 197, 198.

The directors of mutual savings institutions are accordingly held to the strictest standards of accountability. Directors of ordinary corporations are indeed fiduciaries and therefore forbidden to use their office for their private advantage. *Pepper v. Litton*, 308 U. S. 295. The directors of mutual savings institutions, however, unlike those of other corporations, are trustees in the strictest sense. As the Court observed in *Greenfield Savings Bank v. Abercrombie*, 211 Mass. 252, 97 N. E. 897:

“The savings bank and its managing officers or trustees are held to the same duty as ordinary trustees of a direct trust.”

See also *French v. Armstrong*, 79 N.J.E. 289, 82 Atl. 331 (building and loan association) and *Huntington v. Nat. Savings Bank*, 96 U. S. 388, (self-perpetuating directors as “trustees” of mutual savings banks).

The enforcement of the trustees’ obligations of the direc-

¹² Correspondingly, special benefits are conferred by the Government. See Sec. 4(n), 5(g), 5(h), 5(j) and 6, Home Owners’ Loan Act of 1933, as amended, App. A, *infra*, pp. 129 to 133.

tors of an association is a primary responsibility of the supervisory authorities. The Supreme Court in *Treigle v. Acme Homestead*, 297 U. S. 189, 197, stated:

“The state has a peculiar interest and a concomitant power of supervision and regulation to prevent injury and loss to their members.”

The creation of the 21,000 one dollar share accounts was a plain breach of the fiduciary obligations of the directors of the Long Beach Federal Savings & Loan Association, as well as of the Association's charter provisions, and it was the right and duty of the Federal Home Loan Bank's administration to take corrective action. It is settled doctrine that the officers and directors of even an ordinary corporation may not use their positions, either to assist other persons to secure control of the corporation (*Carlisle v. Smith*, 234 Fed. 759; *Gerdes v. Reynolds*, 28 N.Y.S. 2d 622; 3 *Fletcher, Cyclopedia Corporations*, Sec. 1000 (perm. ed.) or to transfer voting control to themselves. As the Court observed in *Andersen v. Albert & J. M. Anderson Mfg. Co.*, 325 Mass. 343; 90 N.E. 2d 541-544:

“Directors cannot take advantage of their official position to manipulate the issue and purchase of shares of the stock of the corporation in order to secure for themselves the control of the corporation and then to place the ownership of the stock in such a position as will perpetuate that control. Such action constitutes a breach of their fiduciary obligations to the corporation and a wilful disregard of the rights of the other stockholders.” (citations p. 544)

This is true even though no specific charter provisions are violated. *Andersen v. Albert & J. M. Anderson Mfg. Co.*, *supra*; *Carlisle v. Smith*, *supra*. Such transactions are peculiarly vulnerable where, as here, they serve to frustrate the express provisions of the corporate charter. An “issue of stock entirely for the separate benefit of the directors” is in “violation of the trust confided in the directors”. *First Mortgage Bond Homestead Ass'n. v. Baker*, 157 Md. 309, 145 Atl. 876.

Section 4 of the Association's charter provides in part:

“In the consideration of all questions requiring action by the members, each holder of a share account shall be permitted to cast one vote for each \$100, or fraction thereof, of the participation value of his share account. * * * No member however shall cast more than 50 votes. * * *”

By the device admittedly employed in this case, 21,000 one dollar share accounts were created in such manner as to vest in the hands of four directors, not four votes or a maximum of 200, but actually 21,000 votes, constituting 10% of the maximum potential total voting power of all shareholders of the Association.¹³

It is no answer, of course, that the votes which the directors thus garnered to themselves, apart from whatever other votes they held, did not constitute an actual majority of the total theoretical potential votes of all of the Association's shareholders. In modern practice, as this Court may take judicial notice, control of 10% of the total theoretical maximum may be sufficient for practical purposes to exercise control of a corporation, such as the Association, whose shares are held by as many as 16,000 individuals.^{13a} In the Public Utilities Holding Company Act of 1935, for example, while 5% of the outstanding voting securities was one test of affiliation (15 U.S.C. 79b(a)(11)) and 10% in the case of holding companies and subsidiaries (15 U.S.C. 79b(a)(7), (8), the same paragraphs recognize that equal influence and control can

¹³ The Association admits the creation of these accounts for voting purposes out of both existing share accounts and other funds. (R. 3241-3) Of course, only persons in control of the Association could set up such “memberships.”

^{13a} In view of the \$5,000 limit on insurance of each member's shareholdings, only recently raised to \$10,000, there was a natural tendency on the part of most savers to limit their investments in any single Association to \$5,000, with the result that these Associations are extremely widely held. See Third Annual Report to Congress of the Housing and Home Finance Agency, p. 131, and S. Rept. No. 1536, 81st Cong., 2d Sess. (1950), p. 10, to accompany H.R. 6743, Federal Home Loan Bank System and the Federal Savings and Loan Insurance Corporation, by the Committee on Banking and Currency.

be exerted with an even lesser percentage of voting stock. The Home Loan Bank Administration could certainly reach the same conclusion with respect to the mutual financial institutions under its supervision. Sec. 5(a) Home Owners' Loan Act of 1933, 12 U.S.C. 1464(a). Were the share accounts thus created actually insufficient, however, to achieve the desired result, the attempt, coupled with the intent to achieve an unlawful purpose, would justify the Administration's action.

As set forth in the "More Definite Statement", the creation of 21,000 share accounts was coupled with other transactions designed to remove the Association's management from the control, not only of its shareholders but of the supervisory authorities as well. On May 8, 1946, as the Association admits, the Association adopted the following resolution

"Whereas, there have been indications that retaliation against the association by those purporting to be representing the federal supervisory authorities is planned because the representative of this association duly elected as a director of the Federal Home Loan Bank of Los Angeles did not disregard the legal rights and best interest of said Bank and submit to the dictation of the Federal Home Loan Bank Commissioner, and

"Whereas, such retaliations are unwarranted and violate the principles of our democratic government and are to the detriment of the best interests of this association.

"Now Therefore Be It Hereby Resolved That the officers of the association be and they are hereby authorized to employ legal counsel to conduct appropriate legal proceedings to restrain said Federal Home Loan Bank Commissioner or his deputies from interfering with the normal and proper conduct of this association's affairs and the sum of \$100,000 is hereby appropriated and authorized to be expended for that purpose."

On May 18, 1946, the Association, acting pursuant to the above resolution, caused a check for \$50,000 to be delivered to Robert H. Wallace, an attorney for the Association, as compensation both for services rendered and "to be rendered" (R. 92).

As the appointment of a Conservator would in all cases interrupt the "normal" operation of the Association, the resolution of May 8, 1946, was broad enough to authorize the use of corporate funds to defend against such appointment, even though the appointment were based principally or solely on charges of mismanagement and breach of trust by the officers and directors of the Association. Such, in fact, was the resolution's intended purpose. Admittedly, it was adopted in anticipation of the very appointment which ensued and which was based on charges of personal mismanagement and breach of trust by the officers and directors of the Association. (R. 8229; 91-93, 3227, 3232, 3237-3239.)

The appropriation or expenditure of corporate funds to defend against such charges was plainly illegal, and the Home Loan Bank Administration was authorized and indeed charged with the duty to prevent such disbursement. It is elementary doctrine that corporate funds may not be used to defend the officers and directors of the corporation against charges of personal mismanagement or misconduct in the exercise of their official duties. *Bailey v. McLellan*, 159 F. 2d 1014; *Rogers v. Hill*, 34 F. Supp. 358, 370 note (D. C. S. D. N. Y.) 152 A.L.R. 924. It is equally well settled that where such charges of misconduct are coupled with an appointment or petition for appointment of a receiver or conservator, corporate funds may not be used for defense of the management against such charges, unless it appears that the purpose is to defend the interests of the corporation "in good faith", and in no event where, as here, the facts establish a clear breach of trust, warranting removal of the management. *Bailey v. McLellan*,

supra; *Art Print Shop v. Friedberger-Aron Mfg. Co.*, 14 F. Supp. 120, affirmed, 82 F. 2d 1010 (3d Cir.).

On the facts admitted by the plaintiffs themselves, the Association's management was guilty of a course of breach of trust in creating the 21,000 one-dollar share accounts. The use of corporate funds to defend against the appointment of a Conservator to effect the removal of the management on any such grounds is illegal. *Bailey v. McLellan, supra*; *Art Print Shop v. Friedberger-Aron Mfg. Co., supra*.

Moreover, the Home Loan Bank Administration, in issuing the order of appointment, duly determined, subject to an administrative hearing, that the officers and directors of the Association had been guilty of other acts of personal misconduct and breach of trust, which findings were binding until duly set aside. *Supra*, pp. 36-38. In the view most favorable to the Association, no attorney's fees could be disbursed to defend the management against such charges save pursuant to a finding by an appropriate tribunal that such defense was in "good faith" intended to protect the interests of the Association itself. See Note, 89 A. L. R. 1531. The Home Loan Bank Board, which may enforce even more exacting fiduciary standards than those prescribed by the common law (*SEC v. Cherry Corp.*, 332 U.S. 194) surely may take action to prohibit a disbursement beyond recall in advance of such finding. The argument that the funds had to be disbursed in advance of the Conservator's appointment is plainly specious. Court allowances on a showing of good faith may be made under appropriate circumstances, even after a receiver is appointed and liquidation of the corporation is ordered. Note 89 A. L. R. 153.

In these circumstances, the order appointing the Conservator was valid without regard to the sufficiency of the other charges made by the Administration, or the motives which animated them. "If the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it * * *". *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, 145;

United States v. Rock Royal Co-operative, 307 U. S. 533, 559-
United States v. Rock Royal Co-operative, 307 U. S. 533, 599-
 560.

Accordingly, the Court need not consider whether, as alleged by the Association, the \$100,000 expenditure authorized by the Association resolution of May 8, 1946, was intended to finance, not only future resistance to the possible appointment of a Conservator, but litigation covering the prior orders dissolving the Los Angeles Bank (R. 91). Such latter purpose was nowhere revealed on the face of the Association's resolution of May 8, 1946, but if, as alleged, such was the intention, and the defendant Fahey somehow divined the secret purpose of the Association's directors and sought to thwart it, such "ulterior" motive on the part of the defendant Fahey would in no wise invalidate the order appointing the Conservator when other valid purposes were also served by the appointment. *Isbrandtsen-Moller Co. v. United States*, *supra* (300 U. S. 139); *United States v. Rock Royal Co-operative*, 307 U. S. 533, 559-560.

2. *The order appointing the Conservator is not open to judicial review on the grounds alleged in the complaint and cross-claims.*

The complaint and cross-claims allege in substance that the grounds assigned in the order of May 20, 1946, appointing the Conservator, as well as in the More Definite Statement, furnished by the Administration, were false in fact and were, moreover, known by the Administration, to be false. These allegations furnish no grounds for review of the Administration's order.

Under the early decisions of the Supreme Court, orders of the Comptroller of the Currency, appointing receivers, and, by analogy, orders of the Administration appointing the Conservator, are not open to judicial review. *Kennedy v. Gibson*, 8 Wall. 498; *Casey v. Galli*, 94 U. S. 673, 681; *Bushnell v. Leland*, 164 U. S. 684.

In *Kennedy v. Gibson*, *supra* at 504-505, the Court said:

"The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of

appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. * * *,”

In *Casey v. Galli*, 94 U. S. 673, 679-680, the Court said:

“The declaration avers that the Association became such, by due and regular proceedings under the act. The plea denies the regularity of the proceedings in the single particular that the owners of two-thirds of the capital stock of the Bank did not authorize the directors of said Bank to convert it into a national banking association, nor to accept an organization certificate as such Banking Association. According to the law of pleading, what is not denied is conceded. The giving of the Comptroller’s certificate is covered by the averment in the declaration, is not denied by the plea, and is, therefore, to be taken as admitted. The plea proposes to go behind the certificate and contradict it. This cannot be done. The Comptroller was clothed with jurisdiction to decide as to the completeness of the organization, and his certificate is conclusive upon the subject for all the purposes of this litigation.

“It has the same effect, and for the same reason, as his determination and order with respect to the amount to be collected from each stockholder in the event of the failure of the association.

In *Bushnell v. Leland*, the Court reaffirmed the doctrine of *Kennedy v. Gibson*, stating:

“* * * All these alleged errors may be reduced to the single contention that under the national banking law the comptroller of the currency is without power to appoint a receiver to a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders of such bank, without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the lia-

bilities of the bank, and that the lodgment of authority in the comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power in violation of the Constitution. All of these contentions have been long since settled, and are not open to further discussion. *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498; *Casey v. Galli*, 94 U. S. 674; *United States v. Knox*, 102 U. S. 423. When, after the adjudication in *Kennedy v. Gibson*, the questions were for a second time pressed in argument, the court contented itself with calling attention to the fact that they had been affirmatively adjudicated upon and were concluded. We see no reason now to reopen controversies which were then treated as concluded and have since been approved and in all respects fully affirmed.

* * *

In *United States v. Knox*, 102 U. S. 422, it is true, the Supreme Court intimated that the Comptroller's decision might be set aside if in conflict with some explicit statutory prohibition. The opinion, however, expressly reaffirmed the authority of *Kennedy v. Gibson*, 8 Wall. 498, and *Casey v. Galli*, 94 U. S. 673. On the contrary, we approve and re-affirm the rule laid down in those cases."

Following *United States v. Knox*, however, the lower Federal Courts have suggested in dicta that judicial review might be had for "clear error of law, fraud, or mistake", as stated in some cases (see e. g. *Deweese v. Smith*, 106 Fed. 438, 445), or, as set forth in others, on the ground of "fraud" alone. See e. g. *O'Conner v. Watson*, 81 F. 2d 833, 836. The former standard of review is certainly "too broad" (*Adams v. Nagle*, 303 U. S. at 541); whether the Comptroller's order could be successfully challenged for "fraud" was left open in *Adams v. Nagle*, *supra*, the Court finding no "actual fraud". 303 U. S. at 543. In any event, it seems clear that the facts alleged in the present complaint and cross-claims, cannot be deemed to constitute "fraud" within the meaning of the possible exception permitting judicial review.

The term "fraud", as used in the dicta referred to, could have one of four possible meanings. Literally construed, it could mean fraud in the conventional sense of an intentional misrepresentation relied on to the plaintiff's damage, which incidentally is alleged in the Association cross-claim (R. 3206), but such meaning obviously could not have been intended by the cases referred to, since Government orders take effect, if at all, on the authority of the administrative officer, and not on the reliance or consent of the parties to whom they are directed.

The second possible construction is that the term "fraud" means such "clear" absence of evidence or basis for the order in controversy as to constitute fraud in legal effect. Cf. *Gt. No. Ry. Co. v. Weeks*, 297 U.S. 135. This construction must be rejected, however, for the reason that, under the guise of determining whether the order was prompted by "fraud" or "malice", the Courts would be required to determine whether there was "clear" lack of any basis for the order, a question which Congress has and constitutionally may leave to the final determination of the Comptroller and the Bank Board, *Kennedy v. Gibson*, *supra*; *Bushnell v. Leland*, *supra*. The opinion in *Adams v. Nagle* plainly indicates that such standard of judicial review is "too broad" (303 U.S. at 541).

The term "fraud" might be given a third meaning, that the findings of the appointing officer were not only unfounded in fact but were "known" to him to be false. This meaning was suggested "arguendo" in *Meeker v. Baxter*, 83 F. 2d 183, 186, in which case, however, the Court pointed out that the term "fraud" had been given no definite meaning for the purpose of such review, and further held that even on the "assumption" that the term meant a knowingly false finding, the allegations of the complaint were insufficient. In principle, again, this definition of the term "fraud" is inadmissible, since reliable evidence of the actual state of mind of the appointing officer could only be obtained by direct interrogation of the officer, a practice which the decisions expressly forbid. It is "not the function of the Court to probe the mental processes" of the adminis-

trative officials. *United States v. Morgan*, 304 U.S. 1, 18, 313 U.S. 409. The Courts thus could make a finding as to the actual state of mind of the appointing officer only by inference from what the officer did, and would thus again be required to determine whether there was cause for the appointment under the guise of reviewing the charge of "fraud". This is particularly true where, as here the charges which are alleged to be "knowingly false" include not merely matters of objective fact but others based on expert opinion or judgment.

This leaves open, of course, the right to judicial review in any case on a showing of personal corruption or other breach of trust for personal gain (*Baker v. Schofield*, 243 U.S. 114; *Village of Brookfield v. Pentis*, 101 Fed. 2d 516, 523) but nothing of the sort is here alleged.

D

THE MALLONEE ACTION IS IN NO EVENT MAINTAINABLE AGAINST THE INDIVIDUAL NONRESIDENT DEFENDANTS, FOR THE REASON THAT THE DISTRICT COURT LACKED JURISDICTION OVER THE PERSON OF SUCH DEFENDANTS.

1. *The Court lacks personal jurisdiction over the non-resident defendants in respect to the demands in the shareholders' complaint and Association's cross-claims.*

The shareholders' complaint and the Association's cross-claims were filed as *in rem* actions under former Sec. 118 (now 1655) of Title 28 U.S.C. to secure the return of property located in the State of California, and to remove a cloud on title thereto. (R. 2965, 3192). The only attempt to serve any of the non-resident defendants was made outside the State of California, see *supra*, p. 8. Such service was clearly not authorized by former Sec. 118 (now Sec. 1655) of Title 28 U.S.C.

a. *Prior to the termination of the conservatorship, the Mallonee action was not maintainable against the non resident defendants even for the limited purpose of removing the Conservator.*

It may be assumed, *arguendo*, that the non-resident defendants were not indispensable parties to an action to remove the Conservator who was personally served and subject to the District Court's jurisdiction, although this is far from clear since the Conservator's taking office not merely physically ousted the former management but suspended its *legal* authority to represent the Association (Reg. 207.3, App. B, p. 154), a disability which could hardly be removed by the Conservator without authority from the Board. *Daggs v. Klein*, 169 F. (2d) 174. The non-resident defendants, however, could not be served in such action for any purpose under Sec. 1655 (former Sec. 118) of Title 28 U.S.C.

Sec. 1655 provides:

“In an action in a district court to endorse any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.”

The Mallonee action is not and never was one within the reach of Sec. 1655. The Board's regulations direct the *Conservator* to take “possession” of the Association's assets, and thereupon vest *in him* the powers of management previously exercised by the Association's officers and directors (Reg 207.1-3, App. B, *infra*, p. 154); the regulations purport to vest “title” in receivers (Reg. 208.3 App. B, *infra*, p. —), but not in conservators. Even the Conservator's “possession” is plainly intended to be nothing more than that of a manager or representative of the Association. The Conservator's appointment involves, therefore, only a change in the personnel acting for the Association, which falls far short of “claims made to property in the nature of ownership or proprietary interest,” (*Ladew v. Tennessee Copper Co.*, 179 Fed. 245, 251; *Cohen Realty Co. v. National Savings & Trust Co.*, 125 F. (2d) 288, 290) to which alone Sec. 1655 relates.

At all events, nothing in the statute or the Board regula-

tions purport to authorize the *non-resident Board members* to take "possession" even in such limited sense, nor is it alleged that any of the non-resident defendants ever did so. In brief, the only adverse "claim," if any, to the Association's assets was that of the Conservator, not of the non-resident defendants. And to effect service on a non-resident defendant under Sec. 1655 of Title 28 U.S.C., "The absent party must have made an express or implied assertion of adverse ownership or encumbrance," *Rainbow Rubber Co. v. Holtite Mfg. Co.*, 20 F. Supp. 913-916. The case of *Commonwealth Trust Co. v. R.F.C.*, 28 F. Supp. 586, on which appellees rely, is not in point; there the non-resident R.F.C. itself claimed an interest in the property as pledgee.

Assuming, however, that the non-resident defendants made a claim to the local property of the Association in any sense, such claim was necessarily made in their official capacities as officers of the Administration or Board. *Wood v. Phillips*, 50 F. (2d) 714, 717. An action to adjudicate such claims is therefore an unconsented suit against the United States. *Larson v. Domestic and Foreign Com. Co.*, 337 US 682; *Wood v. Phillips*, *supra*. Nothing in the Administrative Procedure Act constitutes consent to such suit. See *infra*, p. 78.

b. *The action is clearly not maintainable against the non-resident defendants for damages or other in personam relief.*

Upon the termination of the conservatorship and the return of the Association to its private management, the Mallonee action became one solely for damages, the invalidation of the San Francisco Bank loan and other purely *in personam* relief. But no such relief may be had against non-residents served only pursuant to Sec. 1655 (formerly 118) of Title 28 U.S.C.

Sec. 1655 (formerly 118) expressly provides that judgment in a proceeding "shall, as regards the absent defendant without appearance, affect *only the property which is the subject of the action*" (italics supplied.) Accordingly, it is settled that no action against non-resident defendants is maintainable in such proceedings for *in personam* relief,

whether for money damages (*Wilson v. Beard*, 26 F. (2d) 860; *Findlay v. Florida East Coast Ry. Co.*, 68 F. (2d) 540), injunction (*Ladew v. Tennessee Copper Co.*, 218 U.S. 357; *Clarke v. Boysen*, 39 F. (2d) 800, 815), or for either specific enforcement or the annulment of contracts (*Dan Cohen Realty Co. v. Nat'l Sav. & Trust Co.*, 125 F. (2d) 288; *Wilhelm v. Consolidated Oil Corp.*, 84 F. (2d) 739, 746; *Vidal v. So. Am. Sec. Co.*, 276 Fed. 855; *Maya Corp. v. Smith*, 32 F. (2d) 350.)

No argument is needed to show that the Association's claim for damages for alleged conversions or other torts is not a claim to specific property of the non-resident defendants (*Vidal v. So. Am. Sec. Co.*, *supra*), much less a claim to any property of the Association or other property locally situated in California. And the action to cancel the San Francisco Bank loan or any other "agreement" is "clearly in personam." *Wilhelm v. Consolidated Oil Corp.*, *supra*, at p. 746; *Camp v. Bonsal*, 203 Fed. 913, 917. The demand for a detailed "accounting" is likewise admittedly "personal" (R. 11347), but as it is directed at the former Conservator alone, who was personally served in California, the question whether such relief may be had under Sec. 1655, against non-residents does not arise.

2. *The so-called cross-claims in interpleader afford no basis for service on the non-resident defendants, even in respect of such cross-claims alone.*

In connection with certain so-called "cross-claims in interpleader," an attempt was made to serve the non-resident defendants in Washington, D.C. under former Section 41 (28), now Section 1336, Title 28 USC, authorizing service on non-residents in interpleader actions based on diversity of citizenship of the adverse claimants. Such service could in no event provide a basis for maintaining the complaint and Association's cross-claim for damages and other relief against the non-resident defendants. *Stitzel-Weller Distillery, Inc. v. Norman*, 39 F. Supp. 182. As stated in *Hagan v. Central Avenue Dairy*, 180 F. (2d) 502 (9th Circuit), moreover, cross-claims for damages cannot be rested on

service outside the jurisdiction made under the interpleader statutes; the contrary view expressed in the concurring opinion of Judge Hall in the *Hagan* case found no support in the majority opinion. As this Court there observed (180 F. 2d at 503):

“It would be a startling conclusion, we think, to give to Rule 13(g) and the Interpleader statute the effect of enlarging the jurisdiction of a court to create rights going beyond those to the fund which is the subject of the interpleader action. Such a construction would go far beyond the situation which called for the Interpleader statute in the first place. * * *”

Even as to the so-called “interpleaders” themselves, however, Section 1336 provides no basis for service on the non-resident defendants. The “interpleaders” were not maintainable for any purpose, and certainly not against the non-resident defendants.

First: Certain of the so-called interpleaders, those of the Title Service Company (R. 45), Wallis (R. 86), and Turner (R. 3461) are based on alleged conflicting demands during the period of the conservatorship arising out of the dispute between the Conservator and the then former management of the Association as to who was legally authorized to represent and act on behalf of the Association. Under the rule of *Adams v. Nagle*, 303 U.S. 532, however, the individual acts of the Conservator are valid and enforceable and not subject to collateral attack pending litigation as to the validity of the Conservator’s appointment. The Conservator’s appointment was here never set aside until January 1948, except for the one-day period between the original order of injunction of the District Court on September 30, 1946, and October 1, 1946, the effective date of the stay order staying enforcement of the injunction pending appeal to the Supreme Court. The cross-claimants in interpleader, Title Service Company and Wallis, were therefore bound to recognize the authority of the Conservator at all times during the conservatorship, and there were thus no “adverse claimants” as required by Section 1335. Interpleader was not required to test the Conservator’s authority, more-

over, as the management of Title Service Company and the then former management of the Association were substantially identical (R. 11087), and the latter did not dispute Wallis' right to the \$50,000 check for attorneys' fees (R. 91-2, 320). The dispute as to the duty of Title Service Company to execute reconveyances, as demanded by the Conservator, and as to the right of Wallis to retain the check for legal services, could thus have been decided in litigation with the Conservator alone, without any risk of double liability to either cross-claimant.

The "interpleader" of cross-claimant George Turner is even more specious, as it was not filed until after the termination of the Conservator's appointment (*supra*, p. 8). There were no "adverse claimants", as required by Section 1335, and the rental payments deposited in Court by Turner could safely have been paid to the Association without any possible risk of double liability, since no dispute then existed as to who was entitled to represent the Association.

Moreover, it is a rule of general application that a dispute between two parties as to which is duly authorized to represent a corporation does not present a case for interpleader. *Amstelbank N. V. v. Guaranty Trust Co.*, 177 Misc. Rep. 548, 31 NYS 2d 194, *Koninklijke Lederfabriek "O" v. Chase National Bank*, 177 Misc. Rep. 186, 30 N.Y.S. 2d 518, 524. In the latter case. the Court said:

"* * * They show, to be sure, conflicting assertions as to what individuals are authorized to act on behalf of defendant's depositor and make demands on its behalf, but that presents no more than a question of agency such as defendant is called upon to decide every time a check of a corporate depositor is presented to it. The fact that the question of agency here may be complex rather than simple, and may involve the determination and application of foreign law, does not convert the case into one of two claimants."

Second. The impound of the San Francisco Bank loan and collateral, in turn, plainly presents no proper case for interpleader. The sole basis alleged in the moving papers of the Association is that in the event the Bank loan were declared invalid, the Association might be obligated to some reserve

Bank, either the San Francisco, or the Los Angeles, or Portland Bank, for a part of the benefits derived from the use of the proceeds of the loan and that the Court should resolve which of the banks were entitled to payment for such benefits. The only alleged adverse claimants are the Bank, not the nonresident Board members (R. 3563). Each of the reserve banks lawfully in existence, however, is a citizen of the United States and not of any "state" (Federal Home Loan Bank Act, as amended, App. A; 12 U.S.C. 1421; *et seq.*) and there is, thus, no diversity of citizenship among all of the adverse claimants. *Bankers Trust Co. v. Texas & P. R. Co.*, 241 U. S. 295, Anno. 88 A.L.R. 874. Diversity of citizenship as a basis of service of process on nonresident defendants was required by the applicable statutes when the impound was ordered under former Section 41 (26) of Title 28 U.S.C., and the requirement has expressly been reserved by amendment to the revised Judicial Code. 28 U.S.C. 1335, 2361. There was therefore no basis for out-of-state service on the Board members who are, as shown in II below, indispensable parties to any action to restore the Los Angeles Bank. See *infra* p. 100 This, of course, is in addition to the further and fatal defect that the question of the validity of the orders dissolving the Los Angeles Bank, on which this purported interpleader depends, is not open to judicial review in this proceeding, as we also show in Point II.

Third. The purported interpleader of insurance premiums allegedly owing to the Federal Savings and Loan Insurance Corporation obviously possesses none of the elements essential for a case of interpleader. The alleged adverse claimants are the Insurance Corporation on the one hand and the Association shareholders on the other, who, incidentally, sue in a derivative capacity. (See 332 U.S. at 247) The case is thus an ordinary dispute between one corporation and another with respect to a simple claim of debt. So far as we have been able to ascertain, never in the history of interpleader litigation has it ever been suggested, much less held, that a corporation can convert a simple dispute between itself and a second party into a case for interpleader by impleading its shareholders. Even on the un-

likely assumption that such device could ever be supported as a means for obtaining jurisdiction over nonresident defendants, certainly it may not be done where, as here, one of the supposed adverse claimants, the shareholders, sue only in a "derivative" capacity on behalf of the corporation itself.

Fourth. The nonresident Board members, past or present, have no personal interest in any of the property in controversy. The claim, if any, made by them, was and could only be made in their official capacity, and a suit against them, therefore, is an unconsented suit against the United States. *Wood v. Phillips*, 50 F. (2d) 714, 717; *Appalachian Electric Power Co. v. Smith*, 67 F. (2d) 451.

This conclusion is not affected by the Administrative Procedure Act, contrary to the conclusion of the court below. In general, the Administrative Procedure Act merely restates the existing law as to the scope of permissible judicial review. See Attorney General's Manual on the Administrative Procedure Act, pp. 107-108. Certainly there is not even a hint in the legislative history of the Act that it was intended to abrogate the historic immunity of the United States from suit, and the Supreme Court has recently, upon full consideration, reaffirmed such immunity without even a passing reference to the Administrative Procedure Act. *Larson v. Domestic and Foreign Commerce, Corp.*, 337 U. S. 682. Sec. 10 (e), in authorizing an order to "compel agency action unlawfully withheld or unreasonably delayed" merely confirms the pre-existing power of the courts to compel by writs in the nature of mandamus, the performance of an official's duty to perform a "ministerial or nondiscretionary act." See Attorney General's Manual on the Administrative Procedure Act (p. 108, 1947); *Willapoint Oysters v. Ewing*, 174 F. (2d) 676, 686, 689, n. 17, 690 n. 22, 692, n. 31; *State Airlines v. Civil Aeronautics Board*, 174 F. (2d) 510, 518; *Kirkland v. Atlantic Coast Line R. Co.*, 167 F. (2d) 529; *Olin Industries v. N.L.R.B.*, 72 F. Supp. 225.

The simple fact is that the so-called cross-claims in interpleader have been contrived by the plaintiffs and the

Association, with the cooperation of parties under the Association's control, for the transparent purpose of conferring some semblance of jurisdiction on the court over the non-resident defendants which would obviously otherwise not exist. The inclusion of the so-called cross-claims and interpleader in the Mallonee action, far from affording any basis for jurisdiction to maintain that action or to issue the injunction on appeal, is indeed a persuasive ground for directing the dismissal of the entire proceeding. The so-called interpleaders graphically illustrate the use of the Mallonee action and ancillary proceedings, first as a means of crippling the operations of the Association and rendering impossible its practical continuance under a conservatorship, and then as a means of coercing the nonresident Government defendants by harrassing and vexatious litigation, and thereby requiring them to abandon the Government's defense to money damage claims as a condition of restoring the normal exercise of its supervisory authority and banking facilities throughout the entire West Coast of the United States.

3. *The nonresident defendants at no time submitted themselves to the jurisdiction of the court below.*

The court below found that the nonresident defendants had made "general appearances" and subjected themselves to the personal jurisdiction of the court, both by seeking affirmative relief, and by the issuance of Order No. 388, terminating the conservatorship and directing that a "copy" of the order be furnished to the court (Fdg. 77, R. 8283-4; Concl. 16, R. 8301-2).

It is elementary, however, that objections to the jurisdiction of the court may now be coupled with a defense on the merits. Rule 12(b) of the Federal Rules of Civil Procedure, expressly so provides. *Orange Theatre Corp. v. Ray Heretz Amusement Corp.*, 139 F. (2d) 871; *Gerber v. Fruchter*, 147 F. (2d) 120; *Blank v. Bitken*, 135 F. (2d) 962; *Devine v. Griffenhagen*, 31 F. Supp. 624, 2 *Moore's Federal Practice*, p. 2260, 2d Ed. The contention that, by directing that a copy of its Order No. 388 be filed with the court below, the

Board "waived" its special appearance and submitted to the jurisdiction of the court (R. 11346) requires only brief mention. Since a party may couple a defense on the merits with objection to the court's jurisdiction, the Board was at liberty to call the court's attention to any fact bearing on a proper disposition of the case. It is of interest to observe that the court below itself made no finding of submission to its jurisdiction in its opinion of November 9, 1949, and that even at the *ex parte* hearing of November 11 from which the Government was excluded, the court at first did "not want to hold that that was a personal appearance by the defendants" (R. 11342).

It is difficult, in any event, to understand the point of the finding, since the non-resident defendant Fahey, who was at that time no longer a member of the Board, was not subject to the Board's order, and the persons constituting the Board members at the time Order No. 388 was issued were sued only in their "official capacity" (R. 2771, 3185, 4547-8). The action against them, therefore, was plainly an unconsented suit against the United States and the Board was without power to submit the Government to suit. *Carr v. United States*, 98 U. S. 433. No action is maintainable against the United States for damages save under the Tort Claims Act, which expressly excludes actions based on either abuse of discretion or deceit, and which thus exclude claims such as those alleged in the Mallonee action, based on alleged fraud. (28 USC 2680). It was presumably for this reason that the Tort Claims Act was not invoked as a basis for jurisdiction in any of the pleadings, and was not even mentioned throughout these protracted proceedings, until the hearing of November 8, 1949, and then only by shareholders' counsel (R. 11125).

E

NONE OF THE ORDERS HERETOFORE ENTERED BY THE COURT BELOW PRIOR TO THE INJUNCTION ON APPEAL AFFORD ANY BASIS FOR FURTHER MAINTENANCE OF THE MALLONEE ACTION.

1. *None of such orders are res judicata*

The court below, in finding 62, held that in the prior proceedings “during the three and one half years in which the litigation has been pending” there had been various orders issued containing findings of fact, which orders and the findings therein have become “final,” and “as to the matters and things therein covered, are res judicata.” (R. 8274-5)

If the court below intended to hold that any of the issues decided by the court below in issuing the injunction on appeal are *res judicata*, the finding is plainly erroneous as a matter of law. The only material issues are whether the court below had jurisdiction over the persons of the non-resident defendants for any purpose, and whether any of the pleadings state a claim for relief within the jurisdiction of the court below. None of the orders issued by the court below, or the findings made therein conclude the appellants on these issues, or on the defenses herein asserted, including the immunity of Government officials from damage claims based on alleged malice, the failure of the Association to exhaust its administrative remedy, the validity of the order appointing the Conservator on the admitted facts, or the nonreviewability of that order on the facts alleged.

The governing principles are simple and familiar. The “rules of res judicata are not applicable where the judgment is not a final judgment” (Restatement, Judgments, Sec. 41), and a “judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action.” *Id.* Sec. 68(2). Tested by these settled principles, none of the orders heretofore entered by the court below are res adjudicata of any matter raised on this appeal.

The orders of the District Court overruling the appellant's motions to dismiss or for summary judgment, including both the orders entered on November 10, 1947 (R. 2793) and those entered on October 17, 1949 (R. 7959), were, of course, purely interlocutory and "being interlocutory" were "subject to reconsideration" *General Investment Co. v. Lake Shore & M. S. R. Co.*, 260 U.S. 261, 267.

The orders specifically referred to in Finding 62 are likewise none of them res adjudicata of any issue on this appeal.

The first of these, that of January 23, 1948, was final, it may be assumed, insofar as it ordered the termination of the conservatorship. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120; *Bank of Lewisburg v. Sheffey*, 140 U.S. 445. It was plainly interlocutory, however, and not final, as respects all other provisions, including those relating to the Conservator's accounting. *Republic Natural Gas Co. v. Oklahoma*, 334 US 62, 68.

None of the findings made by the court in connection with so much of the order as terminated the conservatorship even touch upon any issue involved in this appeal. The order was entered on petition of the shareholder plaintiffs "for an order of the court *approving, confirming and interpreting* the Resolution and Order No. 388 of the Home Loan Bank Board, dated January 17, 1948." (R. 8310) (italics supplied) The order itself in terms purports to *enforce* Board Order No. 388 of January 17, 1948, is directed solely to the then Conservator, and thus does not in any way involve any of the issues sought to be raised in the Mallonee action, which *contests* the validity of the *original order* appointing the Conservator, dated May 20, 1946. In fact, nowhere in the Court's Order of January 23, 1948, is there any finding or conclusion with respect to the jurisdiction of the court below over the persons of the nonresident defendants or of the subject matter of the Mallonee action, or as to whether the complaints or cross claims therein state any claim for relief within the jurisdiction of the court below.

The next order, that of March 13, 1948, was entered pursuant to the motion of the Association to impound the notes

evidencing a loan of \$6,300,000 from the San Francisco Bank to the Association during the conservatorship, together with the collateral pledged to secure the same. This order expressly recites that it is "interim in nature" and does "not presently determine the situation concerning such indebtedness" i.e., the indebtedness of the Association to any of the Federal Home Loan Banks involved (R. 8519). The Court expressly declared that "Neither this paragraph nor any part of this order is intended to, nor does it, adjudicate or determine or decide any of the claims, *defenses*, demands, set-offs, accounts, counterclaims or other items or charges between any of the parties hereto" (R. 8522) (*italics supplied*), except that it did limit the claim of the San Francisco Bank to the principal sum demanded by it, namely \$6,300,000, with interest at the rate of two per cent, a matter not disputed by any party.

All of the remaining orders were entered after March 19, 1948, the effective date of Federal Rules of Civil Procedure 54 (b), which permits the entry of a "final judgment" on less than all of the claims presented in one action "only upon an *express* determination that there is no just reason for delay and upon the *express* direction for the entry of judgment," and further provides that "in the absence of such determination and direction, any order * * * which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is *subject to revision at any time* before the entry of judgment adjudicating all the claims." (*italics supplied*) None of the subsequent orders set forth in Finding 62 contained any such finding or direction. *Martineau v. City of St. Paul*, 172 F. (2d) 777; *Kuly v. White Motor Co.*, 174 F. (2d) 742.

Moreover, they are not *res judicata* of any issue on appeal for other independent reasons. The order of March 26, 1948, the third of those referred to in Finding 62, purports to transfer the "claim" of the San Francisco Bank from the notes and trust deeds (impounded by the order of March 13) to some \$6,500,000 of moneys and U.S. Government bonds deposited in court as collateral, and to cancel

any endorsements to the Bank on the notes and trust deeds. The sole justification for the order, however, and the only material finding made was that the order was necessary to avoid undue expense in clearing title to borrowers' homes (R. 8528-8531). There is no finding whatever which even touches on the jurisdiction of the court below over the non-resident defendants or on any of the questions going to the right of plaintiffs and cross-claimants to maintain the Mallonee action for damages or to determine whether the San Francisco Bank loan of \$6,300,000 is a binding obligation of the Association or to secure any of the other relief sought upon the termination of the conservatorship. The appellant San Francisco Bank does not, of course, make any claim to the notes and trust deeds released, because they constituted excess collateral which the Bank would have released from pledge on demand without court order (R. 10437, 8530-1).

The other orders referred to, those of July 30, 1948, and February 2, 1949, were themselves expressly designated "interlocutory," or "preliminary," injunctions (R. 8362, 8372, 8377) issued against ten Northern Federal Savings and Loan Associations and two shareholders of the Long Beach Association respectively, enjoining the maintenance by those parties of certain independent proceedings in other courts during the pendency of this litigation. Moreover, the nonresident defendants were not parties to either of these injunctive proceedings, were not enjoined or otherwise affected by the orders and of course had no right of appeal therefrom. In the former, no finding as to the jurisdiction of the court was made and certainly no ruling was entered on the sufficiency of the complaint and cross-claims in the consolidated actions. In the latter, none of the appellants was enjoined and the Court below made it plain that neither in that order nor in any other previous order had the court ever intended to conclude these defendants on any of the issues now raised on this appeal. In enjoining the maintenance of the shareholders' action in the State Courts, the court held that the action enjoined "involved and will be involved as issuable facts in the cases which

are pending in this Court and which I have already held are appropriately filed, *unless I should grant the motion as to the official defendants,*” (R. 8380) (italics added), a reference to the prior motion of the nonresident defendants to dismiss the Mallonee action and the cross-claims therein, as well as themselves from the action, motions which were not decided or overruled until October 17, 1949 (R. 7959).

The court’s findings elsewhere refer also to orders entered in the 50 or more borrower-intervention proceedings (Fdg. 82, R. 8287). It may be assumed that those orders, insofar as they directed the issuance of reconveyances to the borrower-intervenors, were final. None of such orders, however, are *res adjudicata* as to the claims involved in the complaint or any of the cross-claims in the Mallonee action, for the reason that such complaint and cross-claims involved wholly different causes of action, and none of the material facts or issues in the Mallonee complaint or cross-claims were actually litigated or decided in the borrower-intervention proceedings. Moreover, the orders in the intervention proceedings expressly provide that “the rights heretofore existing of each and every party to this action (except the borrower-intervenor), be and the same are hereby expressly reserved and preserved without prejudice.” (See *e.g.* R. 527, 2869).

Finally, the order of September 2, 1947, making interim allowances for attorney’s fees to plaintiff shareholders, merely found that the court had “jurisdiction of the persons and subject matter *involved*” (R. 2354) (i.e. for the purpose of ordering an interim allowance out of funds deposited in court), and contained no other findings material to any of the issues raised on this appeal. Moreover, it was plainly not intended to be final save as to the interim allowance then made. In its opinion authorizing the allowance, the court expressly stated: “I think that if the time comes when the total value of their earnings should be appraised, that perhaps it should be explored more by way of oral testimony and opportunity of cross-examination, which the resistor (Ammann) could have had here at this

time if they chose to factually oppose this, but they chose not to do at this time".¹⁵ Moreover, the order was rendered moot by the termination of the Conservator's appointment; the dismissal of his appeal in these circumstances (R. 8291, n.) is a further reason why the order is not res judicata.

A further interim allowance of attorneys' fees was made in May 1949, (R. 6543) but the order expressly states that it was without prejudice to the rights, claims, or defenses of any party in further proceedings (R. 6541).

2. *The deposit in court of some \$14,000,000 of assets pursuant to certain of such orders likewise affords no basis for the further maintenance of the Mallonee action or any cross-claims therein.*

In the course of prior proceedings, some \$14,000,000 of assets were deposited or impounded in the registry of the court below, as follows:

1. Approximately \$1,600,000 were deposited in 50 borrower-intervention proceedings. (R. 8291, n.). The money thus deposited in court was substituted for the reconveyances previously deposited by Title Service Company in connection with its "cross-claim in interpleader", and, subject to such substitution, the rights of all parties (other than the borrower-interveners) were "reserved and preserved without prejudice" (R. 527).

2. By orders of March 13 and March 26, 1948, notes evidencing a loan of \$6,300,000 from the San Francisco Bank to the Association during the conservatorship were impounded in court, together with the Association's notes and trust deeds and Government bonds pledged to secure the loan, and the pledge was "lifted" from the notes and trust deeds and "transferred" to the bonds and most of the money (R. 8533-4). These orders were entered in connection with the Association's claims that the loans were unauthorized and void, and that a controversy existed between the Los Angeles and San Francisco Banks as to which was lawfully entitled to the amount, if any, equitably owing

¹⁵ Unpublished opinion of April 7, 1947, reprinted in *Ex parte Fahey*, 133, Misc. U.S. Sup. Ct., Oct. Term 1946, Record, p. 153, 154.

from the Association by reason of actual benefits which it derived from the loan (R. 8404-5).

3. George Turner deposited in court a total of \$18,503.52, as rent due the Association, in connection with his so-called "cross-claim in interpleader" (R. 8290).

4. The Association deposited in court a total of \$36,487.25 as disputed insurance premiums claimed by the Federal Savings and Loan Insurance Corporation, in connection with its petition "in the nature of interpleader" of April and May, 1949 (R. 8266).

The deposit of these assets in court provides no possible basis for further maintenance of the Mallonee action or the cross-claims therein. The Title Service Company's interpleader was an improper collateral attack on the Conservator's appointment, and should be dismissed, (see *supra*, p. 36). The \$1,600,000 of money deposited in court in connection therewith is the property of the Association, subject to the pledge to the San Francisco Bank.

The notes evidencing the Bank loan of \$6,300,000, and all collateral securing same should be returned to the San Francisco Bank since the Association can neither contest the authority of Ammann to make the loan, as we have shown above (*supra*, pp. 50-53), nor question the validity of the orders dissolving the Los Angeles Bank, as we show in Point II below, on which the alleged dispute between the Los Angeles and San Francisco Bank is based.

The George Turner and insurance premium "interpleaders" likewise state no claim for relief whatever, as shown above (see *supra*, pp. 41-42), and should therefore be dismissed with a return of the funds to the purported "stakeholders".

The objection to the proceedings in which these funds were deposited, it should be noted, goes not merely to the sufficiency of the several interpleaders to warrant service on the non-resident defendants under 28 USC 1335, 2361, but to the fundamental lack of any basis for obtaining any judicial relief whatever, including that sought against the San Francisco Bank and the Conservator, personally served in California.

II

The Complaints in the Consolidated Actions, Insofar as They Relate to the Orders of March 29, 1946, State No Claim for Relief Within the Jurisdiction of the Federal Courts

The Complaint in the Los Angeles case is set forth in two counts, count 1 on behalf of the former Los Angeles bank and count 2 on behalf of six associations, former members of the bank. Count 1 alleges that on March 29, 1946, the Federal Home Loan Bank Administration issued three orders, dissolving the Federal Home Loan Bank of Los Angeles, readjusting the Eleventh Home Loan Bank District to include the territory of the Twelfth District formerly served by the Bank of Los Angeles, renaming the Bank of Portland the Bank of San Francisco with headquarters at San Francisco, California, and transferring all assets and liabilities of the Bank of Los Angeles to the Bank of San Francisco. It alleges further that prior to the issuance of the orders in controversy, a dispute had arisen with respect to the selection of a president of the Bank of Los Angeles; that the defendant John H. Fahey, then Commissioner of the Federal Home Loan Bank Administration, had insisted on the selection of a president of his own choosing and in disregard of the desires and wishes of the industry; and that, to resolve the resulting impasse, the defendant Fahey, without hearing or prior notice to the Bank of Los Angeles, arbitrarily issued the orders in controversy, not for the purpose of promoting the more efficient and economical administration of the Home Loan Bank System, but for the arbitrary and unlawful purpose of promoting the defendant Fahey's control and domination of the banking system (R. 9466, *et seq.*).

Count 2 realleges the allegations of Count 1 and further alleges that the associations were the owners of certain assets in the custody of the former Los Angeles Bank, some of them in "safe keeping" and some as collateral for loans by the Bank to the associations, and were also the owners of shares of stock in the former Bank of Los Angeles and that the transfer of these assets to the San Francisco Bank and purported substitution of stock in the latter bank for

that formerly held in the Los Angeles Bank constituted a trespass on the property of the plaintiff associations and a cloud on their title thereto (R. 9485-9492).

The only relief prayed for in the Los Angeles action was a decree invalidating the orders in controversy and restoring the assets of the Bank of San Francisco to their allegedly true owners or custodian, the Bank of Los Angeles.

In the Mallonee action, both the shareholders' complaint and the Association's cross-claim attempt to raise questions with respect to the validity of the orders of March 29, 1946 (R. 3059-3084, 3309-3326). Both pray for declaratory relief adjudging the equitable obligations, if any, of the Association by reason of the loans made from the San Francisco Bank to the Association during the conservatorship; to which of such Banks the Association's obligations, if any, are owing; and in which Bank the Association is a shareholder (R. 3093, 3336). Insofar as the Mallonee action seeks to draw in question the validity of the orders of March 29, 1946, it raises questions similar to those in the Los Angeles action.

The legal issues thus raised in the consolidated actions are narrow in compass. No question could be raised as to the statutory authority of the Federal Home Loan Bank Administration, now the Home Loan Bank Board, to dissolve an existing Bank. Such power, though withheld from the Federal Reserve Board (30 Op. Atty. Gen'l 497), was expressly conferred on the Home Loan Bank Board (Federal Home Loan Bank Act, Sections 25 and 26, 12 U.S.C. 1445, 1446). It is contended, however, that the exercise of the power is conditioned by Section 26 on a finding by the Home Loan Bank Board that "the efficient and economical accomplishments of the Federal Home Loan Bank Act will be aided by such action" and it is alleged that defendant Fahey made no such finding and was not of such an opinion; that his purported finding to such effect in the orders in controversy were in legal effect a "sham and a fraud". It is further contended that the exercise of such authority without notice or opportunity for hearing is a violation of the due process clause of the Fifth Amendment.

These contentions are all without merit. The finding of the Home Loan Bank Administration as set forth in the orders in controversy is not open to judicial review, and the Constitution requires no hearing as a condition of the exercise of the powers granted. Furthermore, the complaints are fatally defective for the reasons that neither the former Los Angeles Bank nor its former association members have any justiciable interest sufficient to call in question the validity of the orders in judicial proceedings; the Home Loan Bank Board members are in any event indispensable parties to the granting of relief prayed for and have not been and cannot be duly served; and finally, the action is an unconsented suit against the United States.

A

THE FINDING OF THE HOME LOAN BANK ADMINISTRATION THAT THE ORDERS IN CONTROVERSY WOULD "AID THE EFFICIENT AND ECONOMICAL ACCOMPLISHMENT OF THE PURPOSES OF THIS ACT", THOUGH MADE WITHOUT HEARING, IS NOT OPEN TO JUDICIAL REVIEW

The argument that the plaintiffs were denied due process because of failure to accord them a hearing would seem to require no extended consideration. Under the express provisions of Section 25 of the Federal Home Loan Bank Act, the former Los Angeles Bank was granted a charter with corporate succession "until dissolved by the Board under this Act," (12 USC 1435, *infra*, App. A, p. 128), and the plaintiff shareholders voluntarily became members of the Bank as constituted. There can be no contention that the Act requires a hearing of any kind as a condition precedent to such dissolution. The plaintiffs are therefore estopped to question the validity of the Act in authorizing dissolution without hearing. "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits," *Ashwander v. T. V. A.*, 297 U. S. 288, 348 (per Brandeis, J. concurring); *Fahey v. Mallonee*, 332 U. S. 245, 255; *Eliason v. Wilborn*, 281 U. S. 457, 459-460; *Booth Fisheries Company v. Industrial Com. of Wis.* 271 U. S. 208; *Interstate Consolidated Street Ry. Co. v. Massachusetts*, 207 U. S. 79, 84; *Grand Rapids and Indiana Ry. Co. v. Osborn*, 193 U. S. 17, 29; *Nuckolls v. United States*, 76 F.

(2d) 357, 360; *American Bond and Mortgage Co. v. United States*, 52 F. (2d) 318, 321-322.¹⁶

The question remains whether the administrative finding pursuant to which the Los Angeles Bank was dissolved, is subject to judicial review. The question presented is solely one of statutory construction. Congress may delegate to the Home Loan Bank Board the power to make the final determination as to whether the efficient and economical accomplishment of the Federal Home Loan Bank Act would be aided by the liquidation of a bank. *Kennedy v. Gibson*, 8 Wall. 498; *United States v. Wright*, 11 Wall. 648. Moreover, both the Bank and its Association members are estopped to question the validity of the Act, if construed to withhold the right to judicial review. *Booth Fisheries Company v. Industrial Com. of Wis.*, *supra*; *Fahey v. Mallonee*, *supra*. Thus, the sole question here is: Has Congress withheld such right? It is submitted that no other conclusion is possible.

Neither the Federal Home Loan Bank Act nor any other Act of Congress makes provision for judicial review of the findings of the Federal Home Loan Bank Board or Administration entered pursuant to Sections 25 and 26 of the Act, and "where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved."

Switchmen's Union of N. A. v. Nat. Mediation Board, 320 U. S. 297, 303;

Louisiana v. McAdoo, 234 U. S. 627, 633;

United States v. Bush & Co., 310 U. S. 371;

Chicago & So. Airlines v. Waterman S. S. Corp., 333 U. S. 103, 111.

¹⁶ Were the question open for consideration, it seems clear that no such hearing is required. The statutes authorizing the appointment of receivers by the Comptroller of the Currency and the liquidation of national banks and assessment of their shareholders, when the Comptroller deems any such bank insolvent, have never required a hearing, nor have any been accorded. Act of June 30, 1876, 19 Stat. 63 (12 USC 191). The validity of the Comptroller's power as thus conferred is not open to question. *Bushnell v. Leland*, 164 U. S. 684; *Kennedy v. Gibson*, 8 Wall. 498; *State Savings & Commercial Bank v. Anderson*, 238 U.S. 611, *aff'd*. 165 Cal. 437; see also *Buttfield v. Stranahan*, 192 U.S. 470, 497. The comptroller's duty to make a "finding" implies no duty to accord a hearing. *Adams v. Nagle*, 303 U.S. 532, 540.

Thus it "has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review."

United States v. Bush & Co., 310 U. S. 371, 380;

Martin v. Mott, 12 Wheat. 19;

Dakota Central Tel. Co. v. South Dakota, 250 U. S. 163;

United States v. Chemical Foundation, 272 U. S. 1.

The courts are particularly reluctant to infer an intention to subject administrative orders to judicial review where the facts on which they must be based "can only be known to an official or a body having wide experience in such matters and ready access to the means of information", and where any conclusions reached are "not entirely susceptible of proof or disproof," (*Williamsport Wire Rope Co. v. United States*, 277 U. S. 551, 561), or are "delicate, complex, and involve large elements of prophecy," (*Chicago and South Airlines v. Waterman Steamship Corp.*, 333 U. S. 103, 111) or must be based on "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,—impressions which may lie beneath consciousness without losing their worth" (*Chicago, B. & Q. R. Co. v. Babcock*, 204 U. S. 585, 598). The few cases in which the Courts have found an intention to confer "a statutory privilege protected by judicial remedies", are not even remotely similar on their facts.

Stark v. Wickard, 321 U. S. 288, 306;

Federal Reserve System v. Agnew, 329 U. S. 441.

The terms of the Federal Home Loan Bank Act and the considerations which must necessarily guide the Board (or Administration) in making its "finding" pursuant thereto require the conclusion that Congress intended to commit to the sole discretion of the administrative agency the question of the proper number of Banks. The authority to "liquidate and reorganize" (Sec. 26) any Bank was deliberately granted, as Representative Hancock, Vice-

Chairman of the House Committee on Banking and Currency explained, so that "the number of banks may later be decreased by the board if the volume of business does not justify the original 12" (75 Cong. Rec. 12609).

The criteria established for designating the original districts and any later reduction in the number of Banks, including the "convenience" of likely members (Sec. 3) and "efficiency" and "economy" in accomplishing the "purposes of the Act" (Sec. 26) plainly refer to matters "not entirely susceptible of proof or disproof" (*Williamsport Wire Rope Co. v. United States*, 277 U. S. 551, 559, *Chicago, B. & Q. R. C. v. Babcock*, 204 U. S. 585, 598), on which judgment must necessarily involve "large elements of prophecy" (*Chicago and South Airlines v. Waterman's Steamship Corp.*, 333 U. S. 103, 111).¹⁷

¹⁷ The prior experience in the establishment of the Federal Reserve System, which presumably guided the Congress in enacting the Federal Home Loan Bank Act, confirms that any determination as to the number of banks must, within the prescribed minimum of eight and maximum of twelve, be committed to final administrative discretion. The criteria adopted in selecting appropriate districts with "due regard to the convenience and course of business" of likely members of the Federal Reserve System were described by a former member of the Federal Reserve Board as follows:

"First. The ability of the member banks within the district to provide the minimum capital of \$4,000,000 required for the Federal Reserve bank, on the basis of 6 per cent of the capital stock and surplus of member banks within the district.

Second. The mercantile, industrial, and financial connections existing in each district and the relations between the various portions of the district and the city selected for the location of the Federal Reserve bank.

Third. The probable ability of the Federal Reserve bank in each district, after organization and after the provisions of the Federal Reserve Act shall have gone into effect, to meet the legitimate demands of business, whether normal or abnormal, in accordance with the spirit and provisions of the Federal Reserve Act.

Fourth. The fair and equitable division of the available capital for the Federal Reserve banks among the districts created.

Fifth. The general geographical situation of the district, transportation lines, and the facilities for speedy communication between the Federal Reserve bank and all portions of the district.

Sixth. The population, area and prevalent business activities of the district, whether agricultural, manufacturing, mining or com-

In ascertaining the "convenience" of members, moreover, it was anticipated that those concerned would resort to the familiar means of making their "convenience" known. As Professor Willis, the technical consultant on organization of the Federal Reserve Banks and Secretary of the Federal Reserve Board during the formative years 1914 to 1918, has aptly observed, the great question in dividing the nation into Reserve Districts is simply "with what minimum attention to economic requirements can political necessities be satisfied?" Willis, *The Federal Reserve System*, p. 563 (1923). With the experience of the administration of the Federal Reserve Act before it, the Congress enacted the Home Loan Bank Act with full knowledge that such was indeed the crucial issue to be resolved in establishing bank districts. As Senator Fess said in discussing on the Senate floor the bill for the creation of the Federal Home Loan Banks: "We shall have to do it by placing the authority to abolish them [Federal Home Loan Banks] somewhere where it can be done without reference to the influence that it would run up against." 75 Cong. Rec. 14580 (1932).

The political considerations in turn have a direct and vital bearing on the sound financial operation of the banking system. It was early observed in the administration of the Federal Reserve System that:

"In the light of recent experience much justification is afforded the view that the regional system is peculiarly susceptible to undue credit expansion. Local pressure for enlarged credit gains is always most intense. Business thrives on easy money; rising prices usually create the situation of a widening margin between costs of production and sale proceeds. Those who are injured by price inflation, those whose money incomes are incapable of quick adjustment, exert only feeble pressure upon the banking administration
* * * Because of the nature of things, it is peculiarly

mercial, its record of growth and development in the past, and its prospects for the future."

Clark, "*Central Banking Under The Federal Reserve System*" pp. 52, 53 (1935).

necessary that the banking structure be such as to make easy denial of demands for excessive credits. It is necessary that banking control be lodged in the hands of those well equipped to resist the credit demands of those who are not responsible for the interests of all classes in society, and who do not have in mind merely the short-time requirements of business."

Reed, "*The Development of Federal Reserve Policy*" (1922) pp. 5-6.

These observations are of peculiar force as applied to the Los Angeles Bank at the time the orders of controversy were issued and thereafter in view of the unprecedented boom in real estate and mortgage credit in the area of that bank during the post-war years.

Even the mere economic considerations which must be weighed in determining the proper area to be included in a single geographical area are addressed to purely administrative direction. *Chicago and So. Airlines v. Waterman's S. S. Corp.*, 333 U. S. 103, 111, (*Williamsport Wire Rope Co. v. United States*, 277 U. S. 551, 559. Thus in the case of the Federal Reserve System, it has been forcefully suggested that "Districts covering a territory diversified in climate and in the nature of their industries may be able more easily to finance exceptional demands in one part by reliance upon surplus funds in another without drawing heavily upon other districts", and that "A section thus diversified is Number 12, the Pacific Coast Section, including States from the Canadian border to the boundary line of Mexico." (Reed, "*The Development of Federal Reserve Policy*", p. 12). This district, it is of interest to note, is almost identical with that created by the orders in controversy.

It is thus for the Board (or its predecessor, the Administration) to determine finally the number of Banks, within the limits of the statutory minimum and maximum, needed for the "convenience" of member institutions and the "efficient and economical" accomplishment of the purposes of the Act.

In issuing its orders of March 29, 1946, dissolving the Los Angeles Bank, the Administration expressly found that "it has been and is hereby determined that the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act, as amended, will be aided by the action contemplated herein" (App. C, *infra* p. 169). The allegation that the finding thus set forth in the orders in controversy, though expressly recited therein, was not in fact made and does not in truth reflect the real purpose of the Administration in issuing the orders. (R. 9479-80), presents no issue for judicial review. Where, as here, the matters are committed for decision in the sole discretion of an administrative agency "The validity of the reasons stated in the orders, or the basis of fact on which they rest, will not be reviewed by the courts." (*United States v. Chemical Foundation*, 272 U. S. 1, 15). As the court observed in *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163, 184:

"The proposition that the President, in exercising the power, [to take over telephone lines and fix rates] exceeded the authority given him, is based upon two considerations: First, because there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; indeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power. But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power."

B

NEITHER THE FORMER LOS ANGELES BANK NOR THE COMPLAINANT ASSOCIATIONS HAVE ANY STANDING TO SUE.

Courts are open only for the redress or prevention of the invasion of legally protected private rights. *Perkins v. Lukens Steel Co.*, 310 U. S. 113; *Tennessee Electric Power Co. v. TVA*, 306 U. S. 118; *Alabama Power Co. v. Ickes*, 302 U. S. 464; *Massachusetts v. Mellon*, 262 U. S. 447.

As the Supreme Court said in *Tennessee Electric Power Co. v. T. V. A.*, *supra* at 137:

“The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.”

Tested by these principles, neither the former Los Angeles Bank nor any of its former member associations have any standing to sue.

1. *The Los Angeles Bank has no standing to sue.*

The Bank was created as an agency of the United States organized for the sole purpose of carrying on “important governmental functions” (*Smith v. Kansas City Title and Tr. Co.*, 255 U. S. 180; *Federal Land Bank v. Gaines*, 290 U. S. 247; *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95), not for any private purposes or objects, but only as an instrument for carrying into effect the powers vested in the government of the United States (*Federal Land Bank v. Bismarck Lumber Co.*, *supra*; *Osborn et al. v. The Bank of the United States*, 9 Wheat. 738, 860).

The sweeping grant of powers to the Board over Federal Home Loan Banks plainly negative any intention that the grant of corporate existence to the Los Angeles Bank should “create” a statutory privilege protected by judicial remedies”, *Stark v. Wickard*, 321 U. S. 288, 306. The Bank and the district which it served were initially created in the sole discretion of the board (Sec. 3; 12 U.S.C. 1423); during its lifetime, the Bank was directed to act only “subject to the approval of the Board” (Sec. 12; 12 U.S.C. Sec. 1432) and could be required without its consent to assume the obligations of consolidated debentures of all the Banks or otherwise extend credit to the other Banks, as the Board might direct (Sec. 11; 12 U.S.C. Sec. 1431); and was given succession only “until dissolved by the board” (Sec. 25; 12 U.S.C. Sec. 1445).

2. *The Associations formerly members of the Los Angeles Bank have no standing to sue.*

Any savings and loan associations organized under the laws of the United States or any State, is eligible by statute to become a member of "a" Federal Home Loan Bank (Sec. 4, 12 U.S.C. 1424), but neither the Federal Home Loan Bank Act nor the Home Owners Loan Act of 1933 confer on such association any right to be a member of any particular Bank in perpetuity. On the contrary, each member financial institution of the Bank acquired its membership and stock under a law which specifically subjected it to the power of the Board to discontinue any bank, including the one in which it holds its membership. Secs. 3, 25, 26, 12 U.S.C. 1423, 1445, 1446. Whatever statutory rights a shareholder has to be a member of some bank, it acquired and has no legal right to continue its membership in any particular bank. For when the statute vested in the Board the power to liquidate a bank, it specifically denied to the members any right to maintenance of membership in a particular bank. Consequently, because no right to maintenance of membership in the Los Angeles Bank existed no right of a stockholder was violated when his membership was transferred to the San Francisco Bank. And because no right was violated, the members have no standing to sue. *Perkins v. Lukens Steel Co.*, *supra*, 310 U. S. 113; *Tennessee Electric Power Co. v. TVA*, *supra*, 306 U. S. 118.

Nor did the transfer to the San Francisco Bank of the collateral for loans and of the cash and bonds of the stockholders of the former Los Angeles Bank invade any legal right of the shareholders of the former Los Angeles Bank. The transfer alone was no invasion of a legally protected interest since the association shareholders in the former Los Angeles Bank had no right to membership in any particular bank. Their purchases of stock in that Bank and deposit of assets or collateral therewith were made as a condition of bank membership (*Peoples Bank v. Federal Res. Bd. of S. F.*, 58 F. Supp. 25) which by statute was subject to transfer at the Board's direction (Sec. 6; 12 U.S.C. 1426 (h) (j)), and do not confer a proprietary inter-

est in the Bank of any kind. *Peoples Bank v. Federal Res. Bk. of S. F.*, 58 F. Supp. 25. Whatever the associations' property rights in their shares of stock or in the assets deposited with the former Los Angeles bank, however, they were in no wise impaired by the orders in controversy. There is no allegation that the per share surplus of the Portland Bank was less than that of the Los Angeles Bank or that the resulting per share surplus of the San Francisco Bank was less than that of the former Los Angeles Bank. Nor is it alleged that the plaintiff associations have made any demand on the San Francisco Bank to redeliver the deposits of bonds and cash held by the Bank "in safekeeping" for the Association, or to redeliver the collateral pledged by such associations upon payment of the loans secured thereby, or to retire the stock of any shareholder pursuant to the provisions of the statute (Sec. 6; 12 U.S.C. 1426(i)) or that the San Francisco Bank has refused to do so on such demand.

The plaintiff association's only grievance, in fact, is that, by virtue of the consolidation of the former Los Angeles and Portland Banks, the California member associations lost the voting control which they had theretofore possessed in respect of the former Los Angeles Bank under the Board regulations, requiring a minimum representation on the Bank board of directors of at least one elective member for each state included in the district, 24 C.F.R. 22, Sec. 122.32. As the only other areas included in the former Twelfth District were the two sparsely populated states of Nevada and Arizona and the Territory of Hawaii, California associations, and particularly the associations of Southern California, were in a position to elect at least half of the board of directors of the former Bank of Los Angeles, an advantage no longer available to them in the new Eleventh District, which includes nine states and two territories, each of which is entitled to one Board member.¹⁸ The advantage, however,

¹⁸ There are only eight elected board members, hence the Board has treated the States of Arizona and Nevada as one for this purpose and have not accorded minimum representation to the two territories. App. C, *infra*, p. 170.

which the California associations formerly enjoyed in the control of the former Los Angeles Bank was not one to which they were entitled as of right under the Home Loan Bank Act, but was merely the incidental result of the original districting of the United States and of the Twelfth District in conformity with the sole discretion of the Board. Secs. 3, 7; 12 U.S.C. 1423, 1427. The loss of such advantage, therefore, was in no wise an invasion of the legally protected rights of the California associations. *Sprunt & Son v. United States*, 281, U. S. 249; *Edward Hines Yellow Pines Trustees v. U. S.*, 263 U. S. 143, 147, 148; *U. S. v. Merchants & Mfgs. Traffic Asso.*, 242 U. S. 178, 188.

C.

THE COURT BELOW LACKED JURISDICTION OVER INDISPENSABLE PARTIES

1. *The Home Loan Bank Board and its members are indispensable parties to the maintenance of the Bank action.*

In so far as the consolidated actions seek to invalidate the order revoking the charter of the former Los Angeles Bank, it is at most an action to enforce a contract, the corporate charter (*Dartmouth College v. Woodward*, 4 Wheat. 518; *Charles River Bridge v. Warren Bridge et al.*, 11 Pet. 420; *U. S. v. Knox*, 102 U. S. 422), to which the Board, as party to the contract, must be joined. *Shields v. Barrow*, 17 How. 130; *Nat. Licorice Co. v. Nat. Labor Rel. Bd.*, 309 U. S. 350, 363.

In so far as the actions seek the return of the assets transferred to the San Francisco Bank, the Board is likewise an indispensable party. The Banks have only such powers as are granted to them by the statute. The Court cannot endow them with additional powers. By the statute every power granted to the banks may be exercised and enjoyed "subject to the approval for the Board". Sec. 12; 12 U.S.C. 1432. To require or empower a Bank to take or hold property, to issue shares of stock, or to take any other action in connection with the reestablishment of the Los Angeles Bank or the acquisition by it of the assets referred to by the plaintiffs would, under the statute, be

utterly ineffective unless the acts done pursuant thereto be approved by the Board. For, as previously observed, the Banks may exercise no authority or power except "subject to the approval of the board." To act independently of Board approval is beyond the statutory powers of the Bank, and the Court cannot authorize or compel a bank to exercise powers which the statute denies to it.

Restoration of the Los Angeles Bank, it should be emphasized, is not a matter of legal theory, but an intensely practical affair. The Bank, if restored, must have the active cooperation of the Board in order to function as intended under the Federal Home Loan Bank Act. The Board would have to conduct the election of officers and directors, approve the persons elected (Sections 7, 12; 12 U.S.C. 1427, 1432), provide funds from the Board's bond issues to finance the Bank's operations (Sec. 11, 12 U.S.C. 1431), and otherwise utilize the Bank as an integral part of the system.

The courts can compel this, if at all, only by the exercise of personal jurisdiction over the Home Loan Bank Board members. And the courts, of course, will not enter a merely futile decree whatever its theoretical jurisdiction to do so. *Wilhelm v. Consolidated Oil Corp.*, 84 F. 2d 739.

In sum, no judgment of the Court attempting to provide the relief which the plaintiffs seek could be effective except as it compelled action by the Home Loan Bank Board. No subordinate subject to the jurisdiction of the Court has the power or authority to perform the acts that would be required of the Board to effectuate any decree that might be entered granting any relief which the plaintiffs seek. Without Board action such a decree would operate in a vacuum and could at most be only an advisory opinion. It would not be a "decree of a conclusive character" granting "specific relief". Cf. *Actna Life Ins. Co. v. Haworth*, 300 U. S. 227, 241. Hence, the Board is an indispensable party to the Bank action. *Williams v. Fanning*, 332 U. S. 490; *Hynes v. Grimes Packing Co.*, 337 U. S. 86; *Daggs v. Klein*, 169 U. S. 2d 174 (9th Cir.).

2. *Valid service on the Board or its Members was not had.*

Admittedly, neither the Home Loan Bank Board nor its members were ever served in the State of California, nor, as shown above (see *supra*, page 79,) did they ever submit to the jurisdiction of the court. The attempt to bring them within the jurisdiction of the court, based upon 28 U.S.C. 1655 (formerly Sec. 118), was unavailing.

Section 1655 provides that in an action to enforce any lien upon or a claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within a district, the court may order an absent defendant to appear, the order to be served either personally upon the absent defendant wherever found or by publication, and the court may then proceed without the absent defendant "but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action."

The indispensable prerequisite, of course, to the recovery of any property by the Los Angeles Bank or to a declaration of stock ownership in the Los Angeles Bank is the restoration of its charter. For without an existing charter, the Los Angeles Bank has no corporate existence, and there is no one in whose favor a decree restoring property can operate. The action thus comes down to one involving the rights acquired by the Los Angeles Bank and the corresponding duties of the Board under the charter issued to it by the Board and subsequently cancelled by Order No. 5082.

There is thus attempted under the guise of an *in rem* action what it is in fact an action to determine the rights and obligations of an obligee under a contract, and to enforce those rights. It is well settled that that may not be done upon constructive service.

The charter is at most a contract between the Bank and the Board. *Dartmouth College v. Woodward*, 4 Wheat. 518; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *United States v. Knox*, 102 U. S. 422. The rights and obligations of that contract are the rights and obligations set forth in the Federal Home Loan Bank Act which itself is a part of the contract. *Salt*

Mfg. Co. v. East Saginaw, 13 Wall. 373; *Ainsworth v. Southwestern Drug Corporation*, 95 F. 2d 172. Whatever rights, if any, the Los Angeles Bank acquired, therefore, to the continuance of its existence derived solely from that charter. There is no other source. And whether or not any of the Bank's rights under the charter were violated and may be enforced against the Board is the question to be determined in the Bank action. Any attempt to recover property must await that determination. *Maya Corporation v. Smith*, 32 F. 2d 350 (D.C. Del.); *Kleinschmidt v. Kleinschmidt Laboratories*, 89 F. Supp. 869 (U.S.D.C.N.D.Ill.).

But that determination may not be made under Section 1655. An action to determine and enforce rights under a contract is not an action to "enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district". (*Dan Cohen Realty Co. v. National Savings & Trust Co.*, 125 F. 2d 288; *Josevig-Kennecott Copper Co. v. Howarth*, 261 Fed. 567; *Wilhelm v. Consolidated Oil Corp.*, 84 F. 2d. 739), but if it were, it is certainly not maintainable at the domicile of the obligee, the Los Angeles Bank, allegedly located, in California. *Murphy v. Ford Motor Co.*, 241 Fed. 134; *Evans v. Scribners & Sons*, 58 Fed. 303.

Moreover, Section 1655 authorizes only a judgment *in rem*. No judgment *in personam* may be entered pursuant thereto, whether for injunction *Ladew v. Tenn. Copper Co.*, 218 U. S. 357, or specific performance *Dan Cohen Realty Co. v. Nat. Sav. & Trust Co.*, 125 F. (2d) 288. Hence, no order could be issued thereunder compelling the Board to give its "approval", as required by the Act to the return of the assets transferred to the San Francisco Bank, the reconstitution of the Los Angeles Bank or to the election of the necessary officers and directors, or the raising of funds or any other act necessary to restore the former Los Angeles Bank as it existed prior to the issuance of the orders in controversy.

A brief word should be added as to the contention advanced by the plaintiff and Association cross-claimant in the Mallonee action that jurisdiction over the non-resident

defendants may be obtained by service under the interpleader statutes, namely Sections 1335 and 2361 of Title 28 USC. The supposed basis for the "interpleader" is that both the Los Angeles and the San Francisco Banks allegedly lay claim to whatever amount is equitably due from the Long Beach Association by reason of the \$6,300,000 loan from the San Francisco Bank to the Association during the conservatorship. For the reasons previously set forth, the allegations in the Mallonee action in this respect are wholly inadequate to state a claim of "interpleader" within the coverage of Sections 1335 and 2361. See *supra*, p. 88.

D

THE SUIT IS ONE AGAINST THE UNITED STATES TO WHICH THE UNITED STATES HAS NOT CONSENTED

The statutory power in the Board to liquidate the Los Angeles Bank is not and, of course, cannot be denied. There is alleged at most a tortious exercise of the power so granted. And the plaintiffs pray that the results of the exercise of the power be undone.

But no decree of a Court which attempts to undo those results can be effective except as it requires specific action by the Board. For even if it be held that the Los Angeles Bank was not dissolved, the Los Angeles Bank can take no action to reacquire the property which it is alleged the San Francisco Bank wrongfully holds nor can it do any other act without the "approval of the board".

Consequently to afford effective relief to the plaintiffs, the Court would have to require specific action by the Board. And any suit for specific relief against an officer or agency of the United States to compel official action is an action against the United States which may not be maintained except with its consent. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682.

The allegation, assumed *arguendo* to be sufficiently pleaded, that "said orders * * * and all of the acts * * * done * * * pursuant thereto operated to and did (a) deprive [the plaintiffs] of * * * property without due or any process of law" does not and cannot alter the rule announced in the *Larson* case. For necessarily any

action which the Board might take in relation to the approval of the exercise of Bank powers required of it by statute is governmental. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682.

“Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.” *Larson v. Domestic and Foreign Commerce Corp.*, *supra* at 691, n.

The United States has not consented to be sued herein. Congress refrained from making the Board a suable entity. It is an unincorporated agency of the United States without power to sue or be sued. The statute of the Board’s creation therefore gave no consent. *Dept. of Agriculture v. Remund*, 330 U. S. 539.

The Administrative Procedure Act, even if that Act is applicable to this case¹⁹, affords no ground for judicial control of the discretionary power of the Board to create and adjust districts and to liquidate or reorganize Federal Home Loan Banks. The right of review granted by that Act runs to “any person suffering legal wrong because of any agency action, or [is] adversely affected or aggrieved by such action within the meaning of any relevant statute”. But as has been shown, the plaintiffs had no legal right which was affected by the adjustment of districts or by the liquidation of the Los Angeles Bank. See *supra*, p. 96.

Further, Section 10 of the Administrative Procedure Act exempts from the review provision action which is by law committed to agency discretion, 5 U.S.C. 1009. That the establishment and readjustment of districts and the establishment and liquidation of Banks is by law committed to the discretion of the Board and involves matters beyond

¹⁹ The Act became effective September 11, 1946, subsequent to the institution of this suit. Cf. *United States v. Heth*, 3 Cranch 399; *United States v. St. Louis S. F. & T. Rr.*, 270 U.S. 1, 3; *Hassett v. Welch*, 303 U.S. 303, 314.

the competence of the courts has been shown above. See *supra* p. 90.

Finally, the Administrative Procedure Act does not purport to waive the preexisting immunity of the United States from suit. In general, as previously noted, it merely codifies the theretofore established rules governing the scope of judicial review. See Attorney General's Manual, p. 96; *Larson v. Domestic & Foreign Commerce Corp.*, *supra*. The authority in section 10(e) to compel official action was not intended, it has been held, to enlarge the theretofore existing scope of judicial review. *State Airlines v. CAB*, 174 F. (2d) 510, 518. There is, of course, no ministerial duty prescribed by the Federal Home Loan Bank Act to restore the Los Angeles Bank or to restore to it the assets heretofore transferred to the San Francisco Bank.

E

THE ORDERS OF MARCH 29, 1946 DISSOLVING THE LOS ANGELES BANK, IF OPEN TO REVIEW IN THIS PROCEEDING, ARE VALID ON THEIR FACE.

The Federal Home Loan Bank Administration duly determined that the dissolution of the Los Angeles Bank and the transfer of its assets to the Bank of Portland, reconstituted the Bank of San Francisco, would promote the "efficient and economical" accomplishment of the purpose of the Act. The power of Congress to delegate to an administrative agency the power to make such determination is not and cannot be questioned. The courts must, therefore, presume that facts exist which support the determination made by the Administration in issuing the orders in controversy, save as the contrary is "specifically set forth"; allegations "which are merely the general conclusions of law or fact" are insufficient. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185. For "the presumption of the existence of facts justifying . . . specific exercise [of duly delegated authority] attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies." *Pacific States Box & Basket Co. v. White*, *supra*, at 186. There is nothing in the allegations of the com-

plaint in the Los Angeles case, however, or in the Mallonee case (insofar as the latter touches upon the validity of the orders dissolving the Los Angeles Bank), which specifically negatives the existence of facts which would warrant the finding made by the Administration in issuing the orders in controversy.

The principal purpose of Congress in authorizing the "liquidation or reorganization" of any banks originally created under the Act, was to reduce the number of banks "if the volume of business does not justify the original twelve" (see *supra*, p. 93). There is not a syllable in any of the allegations in this action which even attempts to negative the presumed fact that there was insufficient business to warrant the maintenance of a separate bank for the former Eleventh District covering the states of the Pacific Northwest. This Court, indeed, may take judicial notice that, from the inception of the Federal Reserve System, it was determined that there was insufficient capital or business to warrant the creation of a separate Federal Reserve Bank for that area. Willis, *Federal Reserve System*, p. 585. Nor is there any allegation in the complaints or cross-claims which attempts to negative the presumed fact that the inclusion in one district of the territory formerly divided between the Eleventh and Twelfth districts, would provide a more economically balanced area. The establishment of but one district for this area in the Federal Reserve System has this important advantage, as previously noted (see *supra*, p. 95).

In fact, the only material allegations made in the complaint in the Los Angeles case (or, in the Mallonee action, which touch upon the validity of the orders dissolving the Los Angeles Bank) are that the Los Angeles Bank had itself previously been "efficiently and economically operated and its affairs were in a healthy and prosperous condition" (R. 9476), and that the orders in controversy were issued, not for the reasons expressly recited therein, but for other allegedly improper reasons growing out of a controversy between the Los Angeles Bank and the defendant Fahey as to the selection of a president for the Los Angeles Bank (R.

9477-8). The allegations as to the efficient and economical operation of the Los Angeles Bank do not, of course, even remotely negative the lack of sufficient business to warrant a separate bank for the Pacific Northwest states or any of the other facts which might warrant the finding made by the Administration, and the existence of which this Court must presume unless specifically negated. The further allegation that the Administration did not in fact make the finding which it purported to make and that it was secretly prompted by other improper motives, presents no question for judicial review. See *supra*, p. 96.

III

Quite Apart from the Foregoing, the Injunction Should Not Have Been Issued

A

THE COURT BELOW LACKED JURISDICTION OVER THE PERSONS OF THE DEFENDANT HOME LOAN BANK BOARD MEMBERS, WITHOUT WHICH THE COURT LACKED POWER TO ISSUE THE INJUNCTION

It is elementary that injunctive relief may be issued only against persons subject to the personal jurisdiction of the Court, and that, accordingly, no injunction may be issued to restrain the institution or continuance of proceedings in another forum in the absence of personal jurisdiction over the parties sought to be enjoined. *Chase National Bank v. Norwalk*, 291 U.S. 431, 435, 436-8; *Scott v. Donald*, 165 U.S. 107, 117.

The injunction against the Board members cannot, of course, be supported as one to enjoin the Board from "knowingly aiding a defendant in performing a prohibited act" on the theory that in respect of the hearing enjoined, the relation of the Board members to the former Conservator or other parties personally served as defendants is that of "associate or confederate". *Chase National Bank v. Norwalk*, *supra* at 436. Neither the former Conservator nor the San Francisco Bank proposes to conduct the hearing. It is the Board which has ordered the hearing to be held, and this pursuant to its own authority, and not in aid of any

hearing ordered to be held by the former Conservator or the San Francisco Bank. If the court below had secured personal jurisdiction of the Bank Board, it would have had personal jurisdiction to enjoin not only the Bank Board, but "associates from knowingly participating in the hearing enjoined (*cf. Chase National Bank v. Norwalk, supra*), but since it is the Board and the Board alone which has ordered the hearing to be held, and since the court below lacked personal jurisdiction over the Board and its members, the court lacked power to enjoin the Board from conducting the hearing.

B

THE ISSUES FOR CONSIDERATION AT THE PROPOSED BOARD HEARING AND ITS OBJECTS WERE NOT THE SAME AS THOSE INVOLVED IN THE PENDING MALLONEE AND LOS ANGELES ACTIONS

It is too clear for argument that the subject matter for hearing under the Board order of September 9, 1949, bears no relation to the subject matter of the Los Angeles action. The Board order relates only to the affairs of the Long Beach Association, while the Los Angeles action is concerned exclusively with the validity of the orders of March 29, 1946, consolidating the reserve banks of the former Eleventh and Twelfth Districts.

There is likewise no such similarity between the issues and objects in the pending Mallonee action and those in the proposed Board hearing as to warrant an injunction against the conduct of the Board hearing. In the view most favorable to plaintiffs, the pending Mallonee action is concerned with damages arising out of the asserted invalidity of the original order of May 20, 1946, appointing a Conservator. The Board order of September 9, 1949, concerns the current operations of the Association and the possibility of taking corrective action in the future. The fact that, in deciding on such possibility, the Board proposes to consider some of the matters that may be involved in the Mallonee action is immaterial, since the objects of the judicial and administrative proceedings are plainly distinct.

The object of the enjoined administrative investigation

and hearing is to determine what, if any, administrative action is necessary in connection with the Long Beach Federal Savings and Loan Association. The administrative proceeding "is a quasi public proceeding, set in motion by a public agency * * *" (*Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 447) in order to determine that agency's governmental responsibilities under the Federal statutes toward the Long Beach Federal Savings and Loan Association. See Sec. 5, Home Owners' Loan Act of 1933, p. —, App. A, 12 U.S.C. 1464. The Court actions, on the other hand, are "merely private suits" (*Pacific Live Stock Co. v. Lewis*, *supra*) to recover damages. It is not enough that some of the matters involved in the Mallonee action may be considered by the Board in the administrative hearing. There is "no substantial identity in the rights asserted and in the purposes sought * * *." *Long v. Stites*, 63 F. 2d 855, (6th Cir.); *Empire Trust Co. v. Brooks*, 232 Fed. 641 (5th Cir.).

The patent case invoked by appellees (*Dwinell-Wright Co. v. National Fruit Product Co.*, 129 F. (2d) 848), provides no analogy. There the statutes establish an election between alternative and mutually exclusive procedures for obtaining the same relief. *Hoover Co. v. Coe*, 325 U.S. 79; *Hemp-hill Co. v. Coe*, 121 F. 2d 897 (D.C. Cir.); *Chase v. Coe*, 122 F. 2d 198 (D. C. Cir.).

C

THE COURT'S FINDING THAT ITS PROCESS IS AVAILABLE TO THE BOARD TO PROTECT THE PUBLIC INTEREST CONFIRMS THAT THE INJUNCTION WAS IMPROVIDENTLY ISSUED.

The court was compelled to recognize that the Association could not escape all duty to comply with laws and regulations duly prescribed by the Board merely by placing itself, in effect, in the "custody" of the court. The court, however, insisted that during the pendency of the litigation (now in the fifth year), the Board may enforce its supervisory functions by invoking the process and powers of the court below.

The court found (Finding 35, R. 8256) :

“That the process and powers of this Court are available to said Home Loan Bank Board to protect and preserve the public interest and rights involved in, or necessarily collateral to, this litigation, and to compel the performance of any alleged unfulfilled duty of said Association, or any other litigant herein, as well as to protect and preserve the assets and rights of the shareholder members and depositors and borrowers from, and other persons doing business with said Association.”

Indeed, in its opinion holding that an injunction issue, the court below indicated that “this court having jurisdiction in this action would have the power upon the appropriate representations to appoint a receiver for the purpose of protecting the public interest or even for the purpose of protecting its own jurisdiction” (R. 11162).

The duty of providing for the operation and regulation of Federal savings and loan associations, however, has been vested by Congress in the Home Loan Bank Board. Section 5(d), Home Owners’ Loan Act of 1933, as amended; *Fahey v. Mallonee*, 332 U.S. 445. It is readily apparent that the complex administrative accounting and financial problems and policies involved in carrying out the mandate of this statute are matters for the Executive Branch rather than the Judicial Branch of the Government. Such functions cannot be suspended because the Association has brought an action for damages in the court below, nor can that court by reason of the pendency of the action assume the functions of the Home Loan Bank Board.

D

THE ORDERING OF AN ADMINISTRATIVE INVESTIGATION AND HEARING ALONE DOES NOT CONSTITUTE IRREPARABLE INJURY.

The Court below has found that the mere conduct of the administrative investigation and hearing would result in irreparable damage to the Association, because of the burden of attendance at the hearing, because it would constitute a duplication of actions, and because, if after hear-

ing the Board required the Association to file reports and otherwise comply with regulations, the Association would thereby sacrifice interests in the litigation.

In *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, the Supreme Court rejected the contention that the exhaustion of administrative remedies should not be required if the pleadings allege that the administrative hearings themselves would result in irreparable damage. In that case the plaintiff alleged that the National Labor Relations Board hearings would be futile and "the holding of them would result in irreparable damage to the Corporation, not only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the Corporation and its employees, and thus seriously impair the efficiency of its operations" (*supra* at 47-48). The Court observed: "Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact" (*id.*, pp. 51-52). Nor is there any substance to the argument that mere holding of the hearing here would require the Association to sacrifice any position it has taken in the litigation. Obviously if, because of the pendency of the litigation or for any other reason, the Association is correct in refusing to comply with the basic regulations governing supervision to the extent of refusing even to submit periodic reports, the courts must assume that the administrative authorities will so find. *Fahey v. Mallonee*, 332 U. S. 245, 255. Moreover, the filing of the reports in question, reflecting the Association's book assets and liabilities, would in no wise constitute any admission, and certainly none which could not be avoided by a simple notation that all statements are contingent on the outcome of the pending litigation (R. 10951).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the preliminary injunction should be reversed and all

the complaints, cross-claims and ancillary proceedings in the consolidated actions should be dismissed.

Respectfully submitted,

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APPENDIX A

FEDERAL HOME LOAN BANK ACT AS AMENDED

* * * * *

SEC. 3. As soon as practicable the board shall divide the continental United States, Puerto Rico, the Virgin Islands, and the Territories of Alaska and Hawaii into not less than eight nor more than twelve districts. Such districts shall be apportioned with due regard to the convenience and customary course of business of the institutions eligible to and likely to subscribe for stock of a Federal Home Loan Bank to be formed under this Act, but no such district shall contain a fractional part of any State. The districts thus created may be readjusted and new districts may from time to time be created by the board, not to exceed twelve in all. Such districts shall be known as Federal Home Loan Bank districts and may be designated by number. As soon as practicable the board shall establish, in each district, a Federal Home Loan Bank at such city as may be designated by the board. Its title shall include the name of the city at which it is established.

SEC. 4. (a) Any building and loan association, savings and loan association, cooperative bank, homestead association, insurance company, or savings bank, shall be eligible to become a member of, or a nonmember borrower of, a Federal Home Loan Bank if such institution (1) is duly organized under the laws of any State or of the United States; (2) is subject to inspection and regulation under the banking laws, or under similar laws, of the State or of the United States; and (3) makes such home mortgage loans as, in the judgment of the board, are long-term loans (and in the case of a savings bank, if, in the judgment of the board, its time deposits, as defined in section 19 of the Federal Reserve Act, warrant its making such loans). No institution shall be eligible to become a member of, or a nonmember borrower of, a Federal Home Loan Bank if, in the judgment of the board, its financial condition is such that advances may not safely be made to such institution or the character of its management or its home-financing policy is inconsistent with sound and economical home financing, or with the purposes of this Act.

(b) An institution eligible to become a member or a non-member borrower under this section may become a member only of, or secure advances from, the Federal Home Loan Bank of the district in which is located the institution's principal place of business, or of the bank of a district adjoining such district, if demanded by convenience and then only with the approval of the board.

(c) Notwithstanding the provisions of clause (2) of subsection (a) of this section requiring inspection and regulation under law as a condition with respect to eligibility for membership, any building and loan association which would be eligible to become a member of a Federal Home Loan Bank except for the fact that it is not subject to inspection and regulation under the banking laws or similar laws of the State in which such association is organized shall, upon subjecting itself to such inspection and regulation as the board shall prescribe, be eligible to become a member.

SEC. 5. No institution shall be admitted to or retained in membership, or granted the privileges of nonmember borrowers, if the combined total of the amounts paid to it for interest, commission, bonus, discount, premium, and other similar charges, less a proper deduction for all dividends, refunds, and cash credits of all kinds, creates an actual net cost to the home owner in excess of the maximum legal rate of interest or, in case there is a lawful contract rate of interest applicable to such transactions, in excess of such rate (regardless of any exemption from usury laws), or, in case there is no legal rate of interest or lawful contract rate of interest applicable to such transactions, in excess of 8 per centum per annum in the State where such property is located. This section applies only to home mortgage loans made after the enactment of this Act.

SEC. 6. (a) As soon as practicable after the enactment of this Act, the board, with the approval of the Secretary of the Treasury, shall determine the minimum capital of each Federal Home Loan Bank which shall be not less than \$5,000,000. The board shall, as soon as practicable thereafter, open books in each district established under section 3 for subscription to the capital stock of the Federal Home Loan Bank of the district.

(b) The capital stock of each Federal Home Loan Bank shall be divided into shares of a par value of \$100 each. The minimum capital stock shall be issued at par. Stock issued thereafter shall be issued at such price not less than par as may be fixed by the board.

(c) The original stock subscription for each institution eligible to become a member under section 4 shall be an amount equal to 1 per centum of the aggregate of the unpaid principal of the subscriber's home mortgage loans, but not less than \$500. The board shall from time to time adjust the amount of stock held by each member so that, as nearly as possible, such member shall at all times have invested in the stock of the Federal Home Loan Bank at least an amount calculated in the manner provided in the preceding sentence (but not less than \$500). If the board finds that the investment of any member in stock is greater than that required under this section, upon application of such member, the bank shall pay such member for each share of stock in excess of the amount so required an amount equal to the value of such stock, or, at the election of the bank, the whole or any part of the payments which would be so made shall be credited upon the indebtedness of the member to the bank. In either such event, stock equal in value to the amount of the payment or credit, or both, as the case may be, shall be surrendered and canceled. No share of stock shall be surrendered and canceled if the effect of such surrender and cancellation would be to violate the provisions of section 10 (c) requiring the amount of stock held by such member to equal at least one-twelfth of the outstanding advances to such member.

(d) Stock subscriptions other than by the United States shall be paid for in cash, and shall be paid for at the time of application therefor, or, at the election of the subscriber, in installments, but not less than one-fourth of the total amount payable shall be paid at the time of filing application, and a further sum of not less than one-fourth of such total shall have been paid at the end of each succeeding period of four months.

(e) If the law of the State under which an institution described in section 4 operates does not permit such institution to subscribe for stock in the Federal Home Loan Bank but if such institution has the power to borrow money and give security therefor, the board may permit such institution to obtain advances on the same terms and conditions and subject to the same limitations as members (except that

such institution shall not be required, during the period during which advances may be made under this subsection, to subscribe for stock in the Federal Home Loan Bank or to deposit such stock as collateral security as required in section 10), but such institution shall be required to keep on deposit such security, in addition to home mortgages, for such advances, as the board shall determine, which shall equal in value 1 per centum of the aggregate unpaid principal of such institution's home mortgage loans (but not less than \$500). No advance to any such institution shall be made under authority of this subsection after the State in which the institution is organized enacts legislation authorizing such institution to subscribe for Federal Home Loan Bank stock or after the expiration of the next regular session of the legislature of such State begun after the enactment of this Act, whichever is earlier. If, at the end of such time, such institution is not authorized to subscribe for stock, the bank shall proceed to liquidate the indebtedness of such institution to the bank and to terminate its relations with such institution. No advance shall be made under authority of this subsection which matures more than one year after the advance is made, but the bank may renew any such advance for yearly periods, or less, thereafter. The maturity of no advance authorized under this subsection shall be later than the time of the enactment of legislation authorizing such institution to become a member or the expiration of such session of the legislature of the State, whichever is earlier.

(f) The Secretary of the Treasury shall subscribe, on behalf of the United States, for such part of the minimum capital of each Federal Home Loan Bank as is not subscribed for by members under subsection (c) of this section within thirty days after books have been opened for stock subscriptions as provided in subsection (a). Payments for stock subscriptions by the Secretary of the Treasury shall be subject to call in whole or in part by the board, with the approval of the Secretary of the Treasury, at such time or times as may be deemed advisable. Each Federal Home Loan Bank receiving such payments shall issue receipts therefor to the Secretary of the Treasury, and such receipts shall be evidence of the stock ownership of the United States. The aggregate amount expended by the United States for the purchase of stock under this Act shall not exceed \$125,000,000. The Reconstruction Finance Corporation Act, approved January 22, 1932, is amended by adding at the end of section 2 thereof the following new paragraph:

“In order to enable the Secretary of the Treasury to make payments upon stock of the Federal Home Loan Banks subscribed for by him in accordance with the Federal Home Loan Bank Act, the sum of \$125,000,000, or so much thereof as may be necessary for such purpose, is hereby allocated and made available to the Secretary of the Treasury out of the capital of the corporation and/or the proceeds of notes, debentures, bonds, and other obligations issued by the corporation. For the purposes of this paragraph, the corporation shall issue such notes, bonds, debentures, and other obligations as may be necessary.”

(g) After the amount of capital of a Federal Home Loan Bank paid in by members equals the amount paid in by the Secretary of the Treasury under subsection (f), such bank shall apply annually to the payment and retirement of the shares of the capital stock held by the United States, 50 per centum of all sums thereafter paid in as capital until all such capital stock held by the United States is retired at par. Stock held by the United States may at any time, in the discretion of the Federal Home Loan Bank, and with the approval of the board, be paid off at par and retired in whole or in part; and the board may at any time require such stock to be paid off at par and retired in whole or in part if in the opinion of the board the Federal Home Loan Bank has resources available therefor: *Provided*, That accumulated dividends, as provided in subsection (k), have been paid.

(h) Stock subscribed for otherwise than by the United States, and the right to the proceeds thereof, shall not be transferred or hypothecated except as hereinafter provided and the certificates therefor shall so state.

(i) Any member may withdraw from membership in a Federal Home Loan Bank six months after filing with the board written notice of intention so to do, and the board may, after hearing, remove any member from membership, or deprive any nonmember borrower of the privilege of obtaining further advances, if, in the opinion of the board, such member or nonmember borrower has failed to comply with any provision of this Act or the regulations of the board made pursuant thereto or if, in the opinion of the board, such member or nonmember borrower is insolvent. In any such case, the indebtedness of such member or nonmember borrower to the Federal Home Loan Bank shall be liquidated, and the capital stock in the Federal Home Loan Bank owned by such member shall be surrendered and canceled. Upon the liquidation of such indebtedness such

member or nonmember borrower shall be entitled to the return of its collateral, and, upon surrender and cancellation of such capital stock, the member shall receive a sum equal to its cash paid subscriptions for the capital stock surrendered, except that if at any time the board finds that the paid-in capital of a Federal Home Loan Bank is or is likely to be impaired as a result of losses in or depreciation of the assets held, the Federal Home Loan Bank shall on the order of the board withhold from the amount to be paid in retirement of the stock a pro rata share of the amount of such impairment as determined by the board.

(j) A Federal Home Loan Bank may, with the approval of the board, permit the disposal of stock to another member, or to an institution eligible to become a member, but only to enable such an institution to become a member.

(k) All stock of any Federal Home Loan Bank shall share in dividend distributions without preference.

SEC. 7. (a) The management of each Federal Home Loan Bank shall be vested in a board of twelve directors, all of whom shall be citizens of the United States and bona fide residents of the district in which such bank is located.

(b) Four of such directors shall be appointed by the Board and shall hold office for terms of four years; except that the terms of office of the two such directors heretofore appointed shall expire at the end of the calendar years 1936 and 1937, respectively, and the terms of office of the first two such directors hereafter appointed shall expire at the end of the calendar years 1938 and 1939, respectively.

(c) Six of such directors, two of whom shall be known as class A directors, two of whom shall be known as class B directors, and two of whom shall be known as class C directors, shall be elected as provided in subsection (e), and shall hold office for terms of two years; except that the terms of office of the directors heretofore elected or appointed shall expire at the end of the terms for which they were elected or appointed.

(d) Two of such directors shall be elected by the members of the Federal Home Loan Bank without regard to classes under rules and regulations to be prescribed by the Board, and shall hold office for terms of two years; except that the term of office of one of the directors first elected

under this subsection shall expire at the end of the calendar year 1936.

(e) The board shall divide all the members of each Federal Home Loan Bank into three groups which shall be designated as groups A, B, and C, which groups shall represent, respectively, and as fairly as may be, group A, the large, group B, the medium-sized, and group C, the small members, the size of such members to be determined according to the aggregate unpaid principal of the member's home mortgage loans. The board may revise the membership of such groups from time to time. Of the directors elected as hereinafter provided, each class A director shall be an officer or director of a member in group A, each class B director shall be an officer or director of a member in group B, and each class C director shall be an officer or director of a member in group C. Each member shall be entitled to nominate suitably qualified persons for election as directors of the class corresponding to the group to which such member belongs, and shall cast one vote for each director in its class. The directors of each class shall be nominated and elected in accordance with such rules and regulations as may be prescribed by the board.

(f) Any director appointed or elected as provided in this section to fill a vacancy shall hold office only until the expiration of the term of his predecessor.

(g) The board shall designate one of the directors of each bank to be chairman, and one to be vice chairman, of the board of directors of such bank.

(h) If at any time when nominations are required, members shall hold less than \$1,000,000 of the capital stock of the Federal Home Loan Bank, the board shall appoint a director or directors to fill the place or places for which such nominations are required. A director so appointed shall serve until the expiration of the calendar year during which he takes office.

(i) Each bank may pay its directors reasonable compensation for the time required of them, and their necessary expenses, in the performance of their duties, in accordance with the resolutions adopted by such directors, subject to the approval of the board.

(j) Such board of directors shall administer the affairs of the bank fairly and impartially and without discrimination in favor of or against any member or nonmember bor-

rower, and shall, subject to the provisions hereof, extend to each institution authorized to secure advances such advances as may be made safely and reasonably with due regard for the claims and demands of other institutions, and with due regard to the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations.

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SEC. 9. Any member or nonmember borrower of a Federal Home Loan Bank shall be entitled to apply in writing for advances. Such application shall be in such form as shall be required by the Federal Home Loan Bank with the approval of the board. Such Federal Home Loan Bank may at its discretion deny any such application, or, subject to the approval of the board, may grant it on such conditions as the Federal Home Loan Bank may prescribe.

SEC. 10. (a) Each Federal Home Loan Bank is authorized to make advances to its members, upon the security of home mortgages, or obligations of the United States, or obligations fully guaranteed by the United States, subject to such regulations, restrictions, and limitations as the Board may prescribe. Any such advance shall be subject to the following limitations as to amount:

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(c) Such advances shall be made upon the note or obligation of the member or nonmember borrower secured as provided in this section, bearing such rate of interest as the board may approve or determine, and the Federal Home Loan Bank shall have a lien upon and shall hold the stock of such member as further collateral security for all indebtedness of the member to the Federal Home Loan Bank. At no time shall the aggregate outstanding advances made by any Federal Home Loan Bank to any member exceed twelve times the amounts paid in by such member for outstanding capital stock held by it, or made to a nonmember borrower exceed twelve times the value of the security required to be deposited under section 6 (e).

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SEC. 10b. Each Federal Home Loan Bank is authorized to make advances to nonmember mortgagees approved under

title II of the National Housing Act. Such mortgagees must be chartered institutions having succession and subject to the inspection and supervision of some governmental agency, and whose principal activity in the mortgage field must consist of lending their own funds. Such advances shall not be subject to the other provisions and restrictions of this Act, but shall be made upon the security of insured mortgages, insured under title II of the National Housing Act. Advances made under the terms of this section shall be at such rates of interest and upon such terms and conditions as shall be determined by the Federal Home Loan Bank Board, but no advance may be for an amount in excess of 90 per centum of the unpaid principal of the mortgage loan given as security.

SEC. 11. (a) Each Federal Home Loan Bank shall have power, subject to rules and regulations prescribed by the board to borrow and give security therefor and to pay interest thereon, to issue debentures, bonds, or other obligations upon such terms and conditions as the board may approve, and to do all things necessary for carrying out the provisions of this Act and all things incident thereto.

(b) The board may issue consolidated Federal Home Loan Bank debentures which shall be the joint and several obligations of all Federal Home Loan Banks organized and existing under this Act, in order to provide funds for any such bank or banks, and such debentures shall be issued upon such terms and conditions as the board may prescribe. No such debentures shall be issued at any time if any of the assets of any Federal Home Loan Bank are pledged to secure any debts or subject to any lien, and neither the board nor any Federal Home Loan Bank shall have power to pledge any of the assets of any Federal Home Loan Bank, or voluntarily to permit any lien to attach to the same while any of such debentures so issued are outstanding. The debentures issued under this section and outstanding shall at no time exceed five times the total paid-in capital of all the Federal Home Loan Banks as of the time of the issue of such debentures. It shall be the duty of the board not to issue debentures under this section in excess of the notes or obligations of member institutions held and secured under section 10 (a) of this Act by all the Federal Home Loan Banks.

(c) At any time that no debentures are outstanding under this Act, or in order to refund all outstanding consolidated

debentures issued under this section, the board may issue consolidated Federal Home Loan Bank bonds which shall be the joint and several obligations of all the Federal Home Loan Banks, and shall be secured and be issued upon such terms and conditions as the Board may prescribe.

(d) The board shall have full power to require any Federal Home Loan Bank to deposit additional collateral or to make substitutions of collateral or to adjust equities between the Federal Home Loan Banks.

(e) Each Federal Home Loan Bank shall have power to accept deposits made by members of such bank or by any other Federal Home Loan Bank or other instrumentality of the United States, upon such terms and conditions as the board may prescribe, but no Federal Home Loan Bank shall transact any banking or other business not authorized by this Act.

(f) The Board is authorized and empowered to permit, or whenever in the judgment of at least four members of the board an emergency exists requiring such action, to require, Federal Home Loan Banks, upon such terms and conditions as the board may prescribe, to rediscount the discounted notes of members held by other Federal Home Loan Banks, or to make loans to, or make deposits with, such other Federal Home Loan Banks, or to purchase any bonds or debentures issued under this section.

(g) Each Federal Home Loan Bank shall at all times have an amount equal to the sums paid in on outstanding capital subscriptions of its members, plus an amount equal to the current deposits received from its members, invested in (1) obligations of the United States, (2) deposits in banks or trust companies, (3) advances with a maturity of not to exceed one year which are made to members or nonmember borrowers, upon such terms and conditions as the board may prescribe, and (4) advances with a maturity of not to exceed one year which are made to members or nonmember borrowers whose creditor liabilities (not including advances from the Federal Home Loan Bank) do not exceed 5 per centum of their net assets, and which may be made without the security of home mortgages or other security, upon such terms and conditions as the board may prescribe.

(h) Such part of the assets of each Federal Home Loan Bank (except reserves and amounts provided for in subsection (g)) as are not required for advances to members or nonmember borrowers, may be invested, to such extent as

the bank may deem desirable and subject to such regulations, restrictions, and limitations as may be prescribed by the board, in obligations of the United States and in such securities as fiduciary and trust funds may be invested in under the laws of the State in which the Federal Home Loan Bank is located.

SEC. 12. The directors of each Federal Home Loan Bank shall, in accordance with such rules and regulations as the board may prescribe, make and file with the board at the earliest practicable date after the establishment of such bank, an organization certificate which shall contain such information as the board may require. Upon the making and filing of such organization certificate with the board, such bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the board it shall have power to adopt, alter, and use a corporate seal; to make contracts; to purchase or lease and hold or dispose of such real estate as may be necessary or convenient for the transaction of its business, but no bank building shall be bought or erected to house any such bank, nor shall any such bank make any lease for such purpose which has a term of more than ten years; to sue and be sued, to complain, and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, subject to the approval of the board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and, by its board of directors, to prescribe, amend, and repeal by-laws, rules and regulations governing the manner in which its affairs may be administered; and the powers granted to it by law may be exercised and enjoyed subject to the approval of the board. The president of a Federal Home Loan Bank may also be a member of the board of directors thereof, but no other officer, employee, attorney, or agent of such bank, who receives compensation, may be a member of the board of directors. Each such bank shall have all such incidental powers, not inconsistent with the provisions of this Act, as are customary and usual in corporations generally.

EXEMPTION FROM TAXATION

SEC. 13. Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Fed-

eral Home Loan Bank bonds and debentures, shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The bank, including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the bank shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The notes, debentures, and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any home-owner debtor of such bank.

SEC. 14. When designated for that purpose by the Secretary of the Treasury, each Federal Home Loan Bank shall be a depository of public money, except receipts from customs, under such regulations as may be prescribed by said Secretary; and it may also be employed as a financial agent of the Government; and it shall perform all such reasonable duties as depository of public money and financial agent of the Government as may be required of it.

SEC. 15. Obligations of the Federal Home Loan Banks issued with the approval of the board under this Act shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. The Federal reserve banks are authorized to act as depositories, custodians, and/or fiscal agents for Federal Home Loan Banks in the general performance of their powers under this Act. All obligations of Federal Home Loan Banks shall plainly state that such obligations are not obligations of the United States and are not guaranteed by the United States.

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FEDERAL HOME LOAN BANK BOARD

SEC. 17. For the purposes of this Act there shall be a board, to be known as the "Federal Home Loan Bank Board", which shall consist of five citizens of the United

States appointed by the President of the United States, by and with the advice and consent of the Senate. Not more than three members of the board shall be members of the same political party. Each member shall devote his entire time to the business of the board. Before entering upon his duties each of the members shall take an oath faithfully to discharge the duties of his office. The President of the United States shall designate one of the members of the board to serve for a term of two years, one for three years, one for four years, one for five years, and one for six years from the date of the enactment hereof, and thereafter the term of each member shall be six years from the date of the expiration of the term for which his predecessor was appointed. Whenever a vacancy shall occur among the members the person appointed to fill such vacancy shall hold office for the unexpired portion of the term of the member whose place he is selected to fill. Each of the members of the board shall receive a salary at the rate of \$10,000 per annum: *Provided*, That during the fiscal year 1933 the salary shall be \$9,000 per annum. The President shall designate one of the members as chairman of the board. The chairman shall be the chief executive officer of the board and in his absence or disability the duties of his office shall be performed by some one of the other members to be designated as acting chairman by the chairman in such order as he may determine. The board shall supervise the Federal Home Loan Banks created by this Act, shall perform the other duties specifically prescribed by this Act, and shall have power to adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the purposes of the provisions of this Act. The board shall have power to suspend or remove any director, officer, employee, or agent of any Federal Home Loan Bank, the cause of such suspension or removal to be communicated in writing forthwith to such director, officer, employee, or agent and to such Federal Home Loan Bank.

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SEC. 19. The board shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the performance of its duties under this Act without regard to the provisions of other laws applicable to the employment or compensation of officers, employees, attorneys, and agents

of the United States. No such officer, employee, attorney, or agent shall be paid compensation at a rate in excess of the rate provided in the case of members of the board. The board shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government; and shall determine its necessary expenditures under this Act and the manner in which they shall be incurred, allowed, and paid. The receipts of the Board derived from assessments upon the Federal Home Loan Banks and from other sources (except receipts from the sale of consolidated Federal Home Loan Bank bonds and debentures issued under section 11) shall be deposited in the Treasury of the United States, and may be from time to time withdrawn therefrom to defray the expenses of the Board and the salaries of its members and employees, whose employment, compensation, leave, and expenses shall be governed solely by the provisions of this Act, specific amendments thereof, and rules and regulations of the Board not inconsistent therewith.

SEC. 20. The board shall from time to time, at least twice annually, require examinations and reports of condition of all Federal Home Loan Banks in such form as the board shall prescribe and shall furnish periodically statements based upon the reports of the banks to the board. The board shall annually make a full report of its operations to the Speaker of the House of Representatives, who shall cause the same to be printed for the information of the Congress. For the purposes of this Act, examiners appointed by the board shall be subject to the same requirements, responsibilities, and penalties as are applicable to examiners under the National Bank Act and the Federal Reserve Act, and shall have, in the exercise of functions under this Act, the same powers and privileges as are vested in such examiners by law.

SEC. 22. (a) In order to enable the board to carry out the provisions of this Act, the Treasury Department, the Comptroller of the Currency, the Federal Reserve Board, and the Federal reserve banks are hereby authorized, under such conditions as they may prescribe, to make available to the board in confidence for its use and the use of any Federal Home Loan Bank such reports, records, or other in-

formation as may be available, relating to the condition of institutions with respect to which any such Federal Home Loan Bank has had or contemplates having transactions under this Act or relating to persons whose obligations are offered to or held by any Federal Home Loan Bank, and to make through their examiners or other employees, for the confidential use of the board or any Federal Home Loan Bank, examinations of such institutions.

(b) Every institution which shall apply for advances under this Act shall, as a condition precedent thereto, consent to such examination as the bank or the board may require for the purposes of this Act and/or that reports of examinations by constituted authorities may be furnished by such authorities to the bank or the board upon request therefor.

SEC. 23. In order that the Federal Home Loan Banks may be supplied with such forms of stock, debentures, and bonds as may be necessary under this Act, the Secretary of the Treasury is authorized to prepare such forms thereof as shall be suitable and approved by the board, which shall be held in the Treasury subject to delivery, upon order of the board. The engraved plates, dies, and bed pieces executed in connection therewith shall remain in the custody of the Secretary of the Treasury. The board shall reimburse the Secretary of the Treasury for any expense incurred in the preparation, custody, and delivery of such stock, debentures, and bonds.

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SEC. 25. Each Federal Home Loan Bank shall have succession until dissolved by the board under this Act or by further Act of Congress.

SEC. 26. Whenever the board finds that the efficient and economical accomplishment of the purposes of this Act will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part.

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HOME OWNERS' LOAN ACT OF 1933 AS AMENDED

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SEC. 4. (a) The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the board of directors of the Corporation and shall serve as such directors without additional compensation.

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(n) The Corporation is authorized to purchase Federal Home Loan Bank bonds, debentures, or notes, or consolidated Federal Home Loan Bank bonds or debentures. The Corporation is also authorized to purchase full-paid-income shares of Federal Savings and Loan Associations after the funds made available to the Secretary of the Treasury for the purchase of such shares have been exhausted. Such purchases of shares shall be on the same terms and conditions as have been heretofore authorized by law for the purchase of such shares by the Secretary of the Treasury: *Provided*, That the total amount of such shares in any one association held by the Secretary of the Treasury and the Corporation shall not exceed the total amount of such shares heretofore authorized to be held by the Secretary of the Treasury in any one association. The Corporation is also authorized to purchase shares in any institution which is (1) a member of a Federal Home Loan Bank, or (2) whose accounts are insured under title IV of the National Housing Act, if the institution is eligible for insurance under such title; and to make deposits and purchase certificates of deposit and investment certificates in any such institution. Of the total authorized bond issue of the Corporation \$300,000,000 shall be available for the purposes of this subsection, without discrimination in favor of Federally chartered associations, and bonds of the Corporation not exceeding such amount may be sold for the purposes of this subsection.

FEDERAL SAVINGS AND LOAN ASSOCIATIONS

SEC. 5. (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

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(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

(f) Each such association, upon its incorporation, shall become automatically a member of the Federal Home Loan Bank of the district in which it is located, or if convenience shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members.

(g) The Secretary of the Treasury is authorized on behalf of the United States to subscribe for preferred shares in such associations which shall be preferred as to the assets of the association and which shall be entitled to a dividend, if earned, after payment of expenses and provision for reasonable reserves, to the same extent as other shareholders. It shall be the duty of the Secretary of the Treasury to subscribe for such preferred shares upon the request of the Board; but the subscription by him to the shares of any one association shall not exceed \$100,000, and no such subscription shall be called for unless in the judgment of the Board the funds are necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community. Payment on such shares may be called from time to time by the association, subject to the approval of the Board and the Secretary of the Treasury; but the amount paid in by the Secretary of the Treasury shall at no time exceed the amount paid in by all other shareholders, and the aggregate amount of shares held by the Secretary of the Treasury shall not exceed at any time the aggregate amount of shares held by all other shareholders. To enable the Secretary of the Treasury to make such subscriptions when called there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$100,000,000, to be immediately available and to remain available until expended. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by the Board, and such receipts shall be evidence of the interest of the United States in such preferred shares to the extent of the amount so paid. Each such association shall make provision for the retirement of its preferred shares held by the Secretary of the Treasury, and beginning at the expiration of five years from the time of the investment in such shares, the association shall set aside one third of the receipts from its investing and borrowing shareholders to be used for the purpose of such retirement. In case of the liquidation of any such association the shares held by the Secretary of the Treasury shall be retired at par before any payments are made to other shareholders.

(h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of the Internal Revenue Code with respect to

wages paid after December 31, 1939, for employment after such date), and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

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(j) In addition to the authority to subscribe for preferred shares in Federal Savings and Loan Associations, the Secretary of the Treasury is authorized on behalf of the United States to subscribe for any amount of full paid income shares in such associations, and it shall be the duty of the Secretary of the Treasury to subscribe for such full paid income shares upon the request of the Federal Home Loan Bank Board. Payment on such shares may be called from time to time by the association, subject to the approval of said Board and the Secretary of the Treasury, and such payments shall be made from the funds appropriated pursuant to subsection (g) of this section; but the amount paid in by the Secretary of the Treasury for shares under this subsection and such subsection (g), together shall at no time exceed 75 per centum of the total investment in the shares of such association by the Secretary of the Treasury and other shareholders. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by said Board and such receipts shall be evidence of the interest of the United States in such full paid income shares to the extent of the amount so paid. No request for the repurchase of the full paid income shares purchased by the Secretary of the Treasury shall be made for a period of five years from the date of such purchase, and thereafter requests by the Secretary of the Treasury for the repurchase of such shares by such associations shall be made at the discretion of the Board; but no such association shall be requested to repurchase any such shares in any one year in an amount in excess of 10 per centum of the total amount invested in such shares by the Secretary of the Treasury. Such repurchases shall be made in accordance with the rules and regulations prescribed by the Board for such associations.

(k) When designated for that purpose by the Secretary of the Treasury, any Federal Savings and Loan Association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. Any Federal Savings and Loan Association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States.

* * * * *

NATIONAL HOUSING ACT

INSURANCE OF SAVINGS AND LOAN ACCOUNTS

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SEC. 402. (a) There is hereby created a Federal Savings and Loan Insurance Corporation (hereinafter referred to as the "Corporation"), which shall insure the accounts of institutions eligible for insurance as hereinafter provided, and shall be under the direction of a board of trustees to be composed of five members and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this title. The members of the Federal Home Loan Bank Board shall constitute the board of trustees of the Corporation and shall serve as such without additional compensation. The principal office of the Corporation shall be in the District of Columbia.

* * * * *

SEC. 403. (a) It shall be the duty of the Corporation to insure the accounts of all Federal savings and loan associations, and it may insure the accounts of building and loan, savings and loan, and homestead associations and cooperative banks organized and operated according to the laws of the State, District, or Territory in which they are chartered or organized.

(b) Application for such insurance shall be made immediately by each Federal savings and loan association, and

may be made at any time by other eligible institutions. Such applications shall be in such form as the Corporation shall prescribe, and shall contain an agreement (1) to pay the reasonable cost of such examinations as the Corporation shall deem necessary in connection with such insurance, and (2) if the insurance is granted, to permit and pay the cost of such examinations as in the judgment of the Corporation may from time to time be necessary for its protection and the protection of other insured institutions, to permit the Corporation to have access to any information or report with respect to any examination made by any public regulatory authority and to furnish any additional information with respect thereto as the Corporation may require, and to pay the premium charges for insurance as hereinafter provided. Each applicant for such insurance shall also file with its application an agreement that during the period that the insurance is in force it will not make any loans beyond fifty miles from its principal office except with the approval of, and pursuant to regulations of, the Corporation, but any applicant which, prior to the date of enactment of this Act, has been permitted to make loans beyond such fifty mile limit may continue to make loans within the territory in which the applicant is operating on such date; will not, after it becomes an insured institution, issue securities which guarantee a definite return or which have a definite maturity except with the specific approval of the Corporation, or issue any securities the form of which has not been approved by the Corporation; will not carry on any sales plan or practices, or any advertising, in violation of regulations to be made by the Corporation; will provide adequate reserves satisfactory to the Corporation, to be established in accordance with regulations made by the Corporation, before paying dividends to its insured members; but such regulations shall require the building up of reserves to 5 per centum of all insured accounts within a reasonable period, not exceeding twenty years, and shall prohibit the payment of dividends from such reserves, or the payment of any dividends if any losses are chargeable to such re-

serves: *Provided*, That for any year dividends may be declared and paid when losses are chargeable to such reserves if the declaration of such dividends in such case is approved by the Corporation.

(c) The Corporation shall reject the application of any applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe; and the Corporation may reject the application of any applicant if it finds that the character of the management of the applicant or its home financing policy is inconsistent with economical home financing or with the purposes of this title. Upon the approval of any application for insurance the Corporation shall notify the applicant, and upon the payment of the initial premium charge for such insurance, as provided in section 404, the Corporation shall issue to the applicant a certificate stating that it has become an insured institution. In considering applications for such insurance the Corporation shall give full consideration to all factors in connection with the financial condition of applicants and insured institutions, and shall have power to make such adjustments in their financial statements as the Corporation finds to be necessary.

(d) Any applicant which applies for insurance under this title after the first year of the operation of the Corporation shall pay an admission fee based upon the reserve fund of the Corporation, which, in the judgment of the Corporation, is an equitable contribution.

SEC. 404. (a) Each institution whose application for insurance is approved by the Corporation shall pay to the Corporation, in such manner as it shall prescribe, a premium charge for such insurance equal to one-twelfth of 1 per centum of the total amount of all accounts of the insured members of such institution plus any creditor obligations of such institution. Such premium shall be paid at the time the certificate is issued by the Corporation under section 403, and thereafter annually until a reserve fund has been estab-

lished by the Corporation equal to 5 per centum of all insured accounts and creditor obligations of all insured institutions; except that under regulations prescribed by the Corporation such premium charge may be paid semi-annually. If at any time such reserve fund falls below such 5 per centum, the payment of such annual premium charge for insurance shall be resumed and shall be continued until the reserve is brought back to such 5 per centum. For the purposes of this subsection, the amount in all accounts of insured members and the amount of creditor obligations of any institution may be determined from adjusted statements made within one year prior to the approval of the application of such institution for insurance, or in such other manner as the Corporation may by rules and regulations prescribe.

(b) The Corporation is further authorized to assess against each insured institution additional premiums for insurance until the amount of such premiums equals the amount of all losses and expenses of the Corporation; except that the total amount so assessed in any one year against any such institution shall not exceed one-eighth of 1 per centum of the total amount of the accounts of its insured members and its creditor obligations.

(c) Each insured institution which has paid a premium charge in excess of one-eighth of 1 per centum of the total amount of the accounts of its insured members and its creditor obligations shall be credited on its future premiums with an amount equal to the total amount of such excess.

PAYMENT OF INSURANCE

SEC. 405. (a) Each institution whose application for insurance under this title is approved by the Corporation shall be entitled to insurance up to the full withdrawable or repurchasable value of the accounts of each of its members and investors (including individuals, partnerships, associations, and corporations) holding withdrawable or repurchasable shares, investment certificates, or deposits, in such institution; except that no member or investor of any such institution shall be insured for an aggregate amount in excess of \$10,000.

(b) In the event of a default by any insured institution,

payment of each insured account in such insured institution which is surrendered and transferred to the Corporation shall be made by the Corporation as soon as possible either (1) by cash or (2) by making available to each insured member a transferred account in a new insured institution in the same community or in another insured institution in an amount equal to the insured account of such insured member: *Provided*, That the Corporation, in its discretion, may require proof of claims to be filed before paying the insured accounts, and that in any case where the Corporation is not satisfied as to the validity of a claim for an insured account, it may require the final determination of a court of competent jurisdiction before paying such claim.

SEC. 406. (a) In order to facilitate the liquidation of insured institutions, the Corporation is authorized (1) to contract with any insured institution with respect to the making available of insured accounts to the insured members of any insured institution in default, or (2) to provide for the organization of a new Federal savings and loan association for such purpose subject to the approval of the Federal Home Loan Bank Board.

(b) In the event that a Federal savings and loan association is in default, the Corporation shall be appointed as conservator or receiver and is authorized as such (1) to take over the assets of and operate such association, (2) to take such action as may be necessary to put it in a sound and solvent condition, (3) to merge it with another insured institution, (4) to organize a new Federal savings and loan association to take over its assets, or (5) to proceed to liquidate its assets in an orderly manner, whichever shall appear to be to the best interests of the insured members of the association in default; and in any event the Corporation shall pay the insurance as provided in section 405 and all valid credit obligations of such association. The surrender and transfer to the Corporation of an insured account in any such association which is in default shall subrogate the Corporation with respect to such insured account, but shall not affect any right which the insured member may have in the uninsured portion of his account or any right which he may have to participate in the distribution of the net proceeds remaining from the disposition of the assets of such association.

(c) In the event any insured institution other than a Federal savings and loan association is in default, the Corporation shall have authority to act as conservator, receiver, or other legal custodian of such insured institution, and the services of the Corporation are hereby tendered to the court or other public authority having the power of appointment. If the Corporation is so appointed, it shall have the same powers and duties with respect to the insured institution in default as are conferred upon it under subsection (b) with respect to Federal savings and loan associations. If the Corporation is not so appointed it shall pay the insurance as provided in section 405, and shall have power (1) to bid for the assets of the insured institution in default, (2) to negotiate for the merger of the insured institution or the transfer of its assets, or (3) to make any other disposition of the matter as it may deem in the best interests of all concerned.

(d) In connection with the liquidation of insured institutions in default, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.

(e) The Corporation shall make an annual report to the Congress of the operation by it of insured institutions in default, and shall keep a complete record of the administration by it of the assets of such insured institutions which shall be subject to inspection by any officer of any such insured institution or by any other interested party, and, if any such insured institution is operated under the laws of any State, Territory, or possession of the United States, or of the District of Columbia, such annual report shall also be filed with the public authority which has jurisdiction over the insured institution.

(f) In order to prevent a default in an insured institution or in order to restore an insured institution in default to normal operation as an insured institution, the Corporation is authorized, in its discretion, to make loans to, pur-

chase the assets of, or make a contribution to, an insured institution or an insured institution in default; but no contribution shall be made to any such institution in an amount in excess of that which the Corporation finds to be reasonably necessary to save the expense of liquidating such institution.

“SEC. 407. Any insured institution other than a Federal savings and loan association may terminate its status as an insured institution by written notice to the Corporation, and the Corporation, for violation by an insured institution of its duty as such may, after written notice of any such alleged violation of duty and after reasonable opportunity to be heard, by written notice to such insured institution, terminate such status. In the event of the termination of such status, insurance of its accounts to the extent that they were insured on the date of such notice, less any amounts thereafter withdrawn, repurchased, or redeemed which reduce the insured accounts of an insured member below the amount insured on the date of such notice, shall continue for a period of two years, but no investments or deposits made after the date of the notice of termination shall be insured. The Corporation shall have the right to examine such institution from time to time during the two-year period aforesaid. Such insured institution shall be obligated to pay, within thirty days after any such notice of termination, as a final insurance premium, a sum equivalent to twice the last annual insurance premium paid by it. In the event of the termination of insurance of accounts as herein provided the institution which was the insured institution shall give prompt and reasonable notice to all of its insured members that it has ceased to be an insured institution and it may include in such notice the fact that insured accounts, to the extent not withdrawn, repurchased, or redeemed, remain insured for two years from the date of such termination, but it shall not further represent itself in any manner as an insured institution. In the event of failure to give notice to insured members as herein provided the Corporation is authorized to give reasonable notice.”

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EXECUTIVE ORDER No. 9070

Feb. 24, 1942, 7 F. R. 1529

CONSOLIDATION OF HOUSING AGENCIES AND FUNCTIONS

NATIONAL HOUSING AGENCY

By virtue of the authority vested in me by Title I of the First War Powers Act, 1941, approved December 18, 1941 (Public Law 354, 77th Congress), and as President of the United States, it is hereby ordered as follows:

1. The following agencies, functions, duties, and powers are consolidated into a National Housing Agency and shall be administered as hereinafter provided under the direction and supervision of a National Housing Administrator:

(a) The Federal Housing Administration and its functions, powers, and duties, including those of the Administrator thereof.

(b) All functions, powers, and duties of the Federal Home Loan Bank Board and of its members.

(c) The Home Owners Loan Corporation and the functions, powers, and duties of its Board of Directors.

(d) The Federal Savings and Loan Insurance Corporation and the functions, powers, and duties of its Board of Trustees.

* * * * *

2. The National Housing Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive a salary of \$12,000 a year unless the Congress shall otherwise provide. Pending such appointment, an existing officer of the Government designated by the President shall act as National Housing Administrator.

3. There shall be three main constituent units in the National Housing Agency. Each such unit shall be administered by a commissioner acting under the direction and supervision of the National Housing Administrator. The unit administering the Federal Housing Administration and its functions, powers, and duties shall be known as the Federal Housing Administration, and the Federal Housing Administrator shall serve as Federal Housing Commissioner. The unit administering the functions, powers, and duties of the Federal Home Loan Bank Board and its members shall be known as the Federal Home Loan Bank Administration, and the Chairman of the Federal Home Loan Bank Board shall serve as Federal Home Loan Bank Commissioner. The United States Housing Authority and its functions, powers, and duties shall be administered as the Federal Public Housing Authority, one of the main constituent units, and the Administrator of the United States Housing Authority shall serve as Federal Public Housing Commissioner. The agencies, functions, powers, and duties enumerated in sub-paragraphs (c), (d), and (k) of paragraph 1 shall be administered in the Federal Home Loan Bank Administration, and those enumerated in sub-paragraphs (f) and (g) shall be administered in the Federal Public Housing Authority. The agency, functions, powers, and duties enumerated in sub-paragraph (h) of paragraph 1 shall also be administered by the Federal Public Housing Commissioner. The Administrator of the National Housing Agency may centralize in the office of the National Housing Administrator such budget, personnel, legal, procurement, research, planning, or other administrative services or functions common to the said constituent units as he may determine.

* * * * *

6. All assets, contracts, and property (including office equipment and records) of any agency hereby consolidated, and all assets, contracts, and property (including office equipment and records) which other agencies, including departments, have been using primarily in the administration of any function, power, or duty hereby consolidated or transferred, are hereby transferred, respectively, with such agency, function, power or duty.

* * * * *

13. Nothing herein shall impair or affect any outstanding obligations or contracts of any agency consolidated hereunder or of the United States of America (including its pledge of faith to the payment of all annual contributions now or hereafter contracted for pursuant to the United States Housing Act, as amended) [sections 1401-1406, 1407-1430 of Title 42], or of any Insurance Funds created under the National Housing Act [section 371 *et seq.* of Title 12].

14. All orders, rules, regulations, permits, or other privileges made, issued or granted by or in respect of any agency, function, power, or duty consolidated hereunder shall continue in effect to the same extent as if such consolidation had not occurred until modified, superseded, or repealed, except that the regulations of January 11, 1941, relating to defense housing coordination shall hereby be revoked upon the appointment or designation of the National Housing Administrator.

* * * * *

17. This order shall become effective as of the date hereof and shall be in force and effect so long as Title I of the First War Powers Act, 1941 remains in force.

REORGANIZATION PLAN NO. 3 OF 1947

Effective July 27, 1947, 12 F. R. 4981

HOUSING AND HOME FINANCE AGENCY

SECTION 1. *Housing and Home Finance Agency.*—The Home Owners' Loan Corporation, the Federal Savings and Loan Insurance Corporation, the Federal Housing Administration, the United States Housing Authority, the Defense Homes Corporation, and the United States Housing Corporation, together with their respective functions, the functions of the Federal Home Loan Bank Board, and the other functions transferred by this Plan, are consolidated, subject to the provisions of sections 2 to 5, inclusive, hereof, into an agency which shall be known as the Housing and Home Finance Agency. There shall be in said Agency constituent agencies which shall be known as the Home

Loan Bank Board, the Federal Housing Administration, and the Public Housing Administration.

SECTION 2. *Home Loan Bank Board*.—(a) The Home Loan Bank Board shall consist of three members appointed by the President by and with the advice and consent of the Senate. Not more than two members of the Board shall be members of the same political party. The President shall designate the members of the Board first appointed hereunder to serve for terms expiring, respectively, at the close of business on June 30, 1949, June 30, 1950, and June 30, 1951, and thereafter the term of each member shall be four years. Whenever a vacancy shall occur among the members the person appointed to fill such vacancy shall hold office for the unexpired portion of the term of the member whose place he is selected to fill. Each of the members of the Board shall receive compensation at the rate of \$10,000 per annum.

(b) The President shall designate one of the members of the Home Loan Bank Board as Chairman of the Board. The Chairman shall (1) be the chief executive officer of the Board, (2) appoint and direct the personnel necessary for the performance of the functions of the Board or of the Chairman or of any agency under the Board, and (3) designate the order in which the other members of the Board shall, during the absence or disability of the Chairman, be Acting Chairman and perform the duties of the Chairman.

(c) Except as otherwise provided in subsection (b) of this section there are transferred to the Home Loan Bank Board the functions (1) of the Federal Home Loan Bank Board, (2) of the Board of Directors of the Home Owners' Loan Corporation, (3) of the Board of Trustees of the Federal Savings and Loan Insurance Corporation, (4) of any member or members of any of said Boards, and (5) with respect to the dissolution of the United States Housing Corporation.

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SECTION 7. *Interim appointments*.—Pending the initial appointment hereunder of any officer provided for by this Plan, the functions of such officer shall be performed temporarily by such officer of the existing National Housing Agency as the President shall designate.

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SECTION 9. *Abolitions.*—The Federal Home Loan Bank Board, the Board of Directors of the Home Owners' Loan Corporation, and the Board of Trustees of the Federal Savings and Loan Insurance Corporation, together with the offices of the members of said boards, the office of Federal Housing Administrator, and the office of Administrator of the United States Housing Authority, are abolished.

APPENDIX B

RULES AND REGULATIONS

(Effective Prior to August 15, 1949; by Reorganization Plan No. 3 of 1947, the Federal Home Loan Bank Administration, Referred to in these regulations, was succeeded by the Home Loan Bank Board)

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202.9 Charter and bylaws—(a) Issuance of charter K.—If the petition for charter is approved, the following charter (hereinafter referred to as a “Charter K”) shall be issued:

CHARTER K

* * * * *

4. *Members.*—All holders of share accounts of the association and all borrowers therefrom shall be deemed and held to be members thereof. In the consideration of all questions requiring action by the members, each holder of a share account shall be permitted to cast one vote for each \$100, or fraction thereof, of the participation value of his share account. A borrowing member shall be permitted, as a borrower, to cast one vote, and to cast the number of votes to which he may be entitled as the holder of a share account. No member, however, shall cast more than 50 votes. Voting may be by proxy. Any number of members present at a regular or special meeting of the members shall constitute a quorum. A majority of all votes cast at any meeting of members shall determine any question. The members who shall be entitled to vote at any meeting of the members shall be those owning share accounts and borrowing members of record on the books of the association at the end of the calendar month next preceding the date of the meeting of members.

5. *Directors and officers.*—The association shall be under the direction of a board of directors of not less than 5 nor more than 15, as determined and elected by the members. Directors shall be elected by ballot from the membership of the association, and a director shall

cease to be a director when he ceases to be a member. At the first meeting of members of the association, directors shall be elected to serve until the first annual meeting and until their successors are duly elected and qualified. Thereafter directors shall be elected for periods of 3 years and until their successors are elected and qualified, but provision shall be made for the election of approximately one-third of the board of directors each year. In the event of a vacancy, including vacancies created by an increase by vote of the members of the number of directors within the limits hereinabove specified, the board of directors may fill the vacancy, if the members fail so to do, by electing a director to serve until the next annual meeting of the members, at which time a director shall be elected to fill the vacancy for the unexpired term. At its meeting, which shall be held as soon as practicable after the annual meeting of members, the board of directors shall elect a president, one or more vice presidents, a secretary, and a treasurer. It may appoint such additional officers and employees as it may from time to time determine. The offices of secretary and treasurer may be held by the same person, and a vice president may also be either the secretary or the treasurer. The term of office of all officers shall be one year or until their respective successors are elected and qualified; but any officer may be removed at any time by the board of directors. In the absence of designation from time to time of powers and duties by the board of directors, the officers shall have such powers and duties as generally pertain to the respective offices.

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203.2. Other examinations, audits, and supervision.—For the protection of its members and the public, each Federal association shall be examined (with appraisals when deemed advisable) at least annually by the examining division of the Board. The cost, as determined by the Board, of such examination, including office analysis thereof, audit, and any appraisals made in connection therewith and of other supervision by the Board shall be paid by the Federal association. If a Federal association is not audited at least once each year in a manner and by auditors satisfactory to the Board, the examination of such Federal association shall include an audit. Two copies of any audit of a Federal association, signed and certified by the auditor making such audit, shall promptly be filed with the Board through the Federal home loan bank of which the Federal associa-

tion is a member. To assist in proper maintenance of records for supervision and regulation, communications from Federal associations shall normally be forwarded to the Board in duplicate through the Federal home loan bank of which the Federal association is a member. (Sec. 5 (a) of H. O. L. A. of 1933, 48 Stat. 132; 12 U. S. C. 1464 (a).)

* * * * *

203.5. Forms and reports.—Every Federal association shall use such forms and follow such accounting practices as may, from time to time, be prescribed by the Board. Every Federal association shall close its books on June 30, and December 31, of each year and shall make an annual report of its affairs as of December 31 of each year. Within thirty days after December 31 of each year two copies shall be forwarded to the Federal home loan bank of which the association is a member, one copy of which shall thereupon be transmitted by the bank to the Governor of the Federal Home Loan Bank System. The officers of each association shall make a monthly report to the association's board of directors on forms prescribed by the Board which shall be filed as follows: One copy shall be forwarded to the Federal home loan bank of which the association is a member and two copies to the Governor of the Federal Home Loan Bank System, Washington, D. C. Within the month of January of each year, a copy of a statement of condition of each Federal association, as of December 31, immediately preceding, in form prescribed by the Board shall either be mailed to each of the association's members at his last address appearing on the association's books, or published in a newspaper printed in the English language and of general circulation in the county in which the association's home office is located; provided, however, that said statement may be in greater detail and may omit such items as are inapplicable. Within 5 days after the statement has been so mailed or published a statement signed by an executive officer of the association, certifying that the statement has been so mailed or published, together with a copy of the statement of condition, shall be transmitted to the Governor of the Federal Home Loan Bank System, Washington, D. C., and to the President of the Federal Home Loan Bank of which the association is a member. (Sec. 5 (a) of H. O. L. A. of 1933, 48 Stat. 132; 12 U. S. C. 1464 (a).)

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203.7. Investments by Home Owners' Loan Corporation.—Whenever a Federal association needs funds for the

financing of homes, it may request Home Owners' Loan Corporation to purchase an investment share account, consisting of full-paid income shares, as provided in section 4 (n) of Home Owners Loan Act of 1933, as amended, and in investment procedure approved by the Board. (Sec. 5 (a) of H. O. L. A. of 1933, 48 Stat. 132, sec. 4 (n) H. O. L. A. of 1933 as added by sec. 17 (a), 49 Stat. 297; 12 U. S. C. 1464 (a), 12 U. S. C. Sup., 1463 (n).)

203.8. Investment and redemption procedure for Home Owners' Loan Corporation and Secretary of the Treasury—(a) Maximum investment in one association by the Home Owners' Loan Corporation.—No requests for such investment by Home Owners' Loan Corporation will be approved by the Board in excess of three times the amount paid on unpledged share accounts standing to the bona fide credit of private investors. In determining the upper limit of investment by Home Owners' Loan Corporation in any Federal association, the Board will multiply the amount of unpledged share accounts standing to the credit of private investors by three, and subtract therefrom the amount of any subscription for preferred shares and full-paid income shares by the Secretary of the Treasury plus the amount of any investment, or request for investment, by Home Owners' Loan Corporation.

(b) Forms for investments by Home Owners' Loan Corporation.—Forms for certification of financial statement, resolution authorizing procedure for investment, and application forms for use by Federal associations in requesting investment by Home Owners' Loan Corporation may be procured from the Federal home loan bank of which the Federal association is a member.

(c) Repurchase fee.—No repurchase fee may be charged upon the repurchase of any investment by the Secretary of the Treasury or by Home Owners' Loan Corporation.

(d) Retirement of investments by the Secretary of the Treasury or Home Owners' Loan Corporation.—Retirement of investments by the Secretary of the Treasury or by Home Owners' Loan Corporation in Federal associations may be effected in accordance with procedure and using forms approved by the Board, which procedure and forms may be obtained from the Federal home loan bank of which the Federal association is a member. No request for the privilege of retiring investments by the Secretary of the Treasury will be approved by the Board unless such request

is received by the Board at its office in Washington, D. C. within 30 days subsequent to the last preceding dividend date, accompanied by a check, postal money order, or bank draft in the amount of the investment sought to be retired, together with any dividends declared but unpaid, on such investment to the last preceding dividend date. Any Federal association may request from time to time the voluntary repurchase of investments by the Secretary of the Treasury and by Home Owners' Loan Corporation in the same order as applications for repurchase of such investments may be made by the Secretary of the Treasury and Home Owners' Loan Corporation under subsection (j) of section 5 and subsection (n) of section 4 of Home Owners Loan Act of 1933, as amended. All such voluntary repurchases will be deducted from the next succeeding requests for repurchase which the Secretary of the Treasury or Home Owners' Loan Corporation is permitted by law to make.

(e) Retirement of investments upon request by the Secretary of the Treasury or the Home Owners' Loan Corporation.—The basis for computing the amount of repurchases which the Secretary of the Treasury or the Home Owners' Loan Corporation may at any time request shall be the original amount of separate investments made five years or more prior to the date of each such request, and the original amount of each such separate investment shall be included in the said basis until such time as the investment would have been fully retired had separate requests been made for the retirement of the investment and had the repurchases been applied accordingly. Repurchases shall be applied toward the retirement of the investment first made by the Secretary of the Treasury or the Home Owners' Loan Corporation and not previously retired.

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203.18. Fiscal agency powers and duties.—When designated for that purpose by the Secretary of the Treasury, a Federal association shall perform all such reasonable duties as fiscal agent of the Government specified by the Secretary of the Treasury. Such a Federal association shall exercise only such powers and privileges as a fiscal agent of the Government as are enumerated in regulations prescribed by the Secretary of the Treasury. When the designation for that purpose by any other instrumentality

of the United States has been approved by the Board, a Federal association upon qualification for such employment shall perform the duties as agent of such instrumentality specified by such instrumentality of the United States. Such a Federal association shall exercise only such powers and privileges as an agent of any other instrumentality of the United States as are prescribed by such other instrumentality of the United States. (Sec. 5 (a) of H. O. L. A. of 1933, 48 Stat. 132, sec. 5 (k) of H. O. L. A. of 1933 as added by sec. 5, 48 Stat. 646; 12 U. S. C. 1464 (a), (k).)

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206.1. Receiver or conservator, appointment.—Whenever, in the opinion of the Federal Home Loan Bank Administration, any Federal savings and loan association:

(1) is conducting its business in an unlawful, unauthorized, or unsafe manner;

(2) is in an unsound or unsafe condition, or has a management which is unsafe or unfit to manage a Federal savings and loan association;

(3) cannot with safety continue in business;

(4) is impaired in that its assets do not have an aggregate value (in the judgment of the Federal Home Loan Bank Administration) at least equal to the aggregate amount of its liabilities to its creditors, members, and all other persons;

(5) is in imminent danger of becoming impaired;

(6) is pursuing a course that is jeopardizing or injurious to the interests of its members, creditors, or the public;

(7) has suspended payment of its obligations;

(8) has refused to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Federal Home Loan Bank Administration;

(9) has refused by the refusal of any of its officers, directors, or employees to be examined upon oath by the Federal Home Loan Bank Administration or its representative concerning its affairs; or

(10) has refused or failed to observe a lawful order of the Federal Home Loan Bank Administration, the Federal Home Loan Bank Administration may appoint the Federal Savings and Loan Insurance Corporation receiver for such Federal association, which appointment shall be for the purpose of liquidation, or the Federal Home Loan Bank Administration may appoint a conservator for such Fed-

eral association to conserve the assets of the association pending further disposition of its affairs. The appointment shall be by order, which order shall state on which of the above causes the appointment is based. Any conservator so appointed shall furnish bond for himself and his employees, in form and amount and with surety acceptable to the Governor of the Federal Home Loan Bank System, or any deputy or Assistant Governor, but no bond shall be required of the Federal Savings and Loan Insurance Corporation as receiver. The conservator or receiver shall forthwith upon appointment take possession of the association and, at the time such conservator or receiver shall demand possession, such conservator or receiver shall notify the officer or employee of the association, if any, who shall be in the home office of the association and appear to be in charge of such office, of the action of the Federal Home Loan Bank Administration. The Secretary of the Federal Home Loan Bank Administration shall, forthwith upon adoption thereof, mail a certified copy of the order of appointment to the address of the association as it shall appear on the records of the Federal Home Loan Bank Administration and to each director of the association, known by the Secretary to be such, at the last address of each as the same shall appear on the records of the Federal Home Loan Bank Administration. If such certified copy of the order appointing the conservator or receiver is received at the offices of the association after the taking of possession by the conservator or receiver, such conservator or receiver shall hand the same to any officer or director of the association who may make demand therefor. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

206.2. Hearing on appointment.—Within fourteen days (Sundays and holidays included) after the appointment of a conservator or receiver for a Federal association not at the time of such appointment in the hands of a conservator, such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may file an answer and serve a written demand for a hearing, authorized by its board of directors, which demand shall state the address to which notice of hearing shall be sent. Upon receipt of such answer and written demand for a hearing the Federal Home Loan Bank Administration shall issue and serve a notice of hearing upon the institution by mailing a copy of the order of hearing to the address stated in the demand

therefor and shall conduct a hearing, at which time and place the Federal association may appear and show cause why the conservator or receiver should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the conservator or receiver. Such hearing shall be held either in the district of the Federal Home Loan Bank of which such Federal association is a member or in Washington, D. C., as the Federal Home Loan Bank Administration shall determine, unless the association otherwise consents in writing. Such hearing may be held before the Federal Home Loan Bank Commissioner or before a trial examiner or hearing officer, as the Federal Home Loan Bank Administration shall determine. Such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may, within seven days (Sundays and holidays included) of such appointment, serve a written or telegraphic demand, authorized by its board of directors, upon the Federal Home Loan Bank Administration for a more definite statement of the cause or causes for the action. The time of service upon the Federal Home Loan Bank Administration for the purposes of this Section shall be the time of receipt by the Secretary of the Federal Home Loan Bank Administration. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

206.3. Costs of hearings.—Costs, as determined by the Federal Home Loan Bank Administration, of hearings held pursuant to section 206.2 may be assessed against the association demanding the same upon the order of the Federal Home Loan Bank Administration unless the Federal Home Loan Bank Administration finds upon such hearing that there is no cause for the appointment of a conservator or receiver. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

206.4. Discharge of conservator or receiver.—An order of the Federal Home Loan Bank Administration discharging a conservator and returning the association to its management shall restore to such Federal association all its rights, powers and privileges and shall restore the rights, powers, and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. An order of the Federal Home Loan Bank Administration discharging a receiver and returning

the association to its management shall by operation of law and without any conveyance or other instrument, act or deed, restore to such Federal association all its rights, powers and privileges, revest in such Federal association the title to all its property, and restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

206.5. Effect of amendments to regulations.—Amendments to these rules and regulations shall not affect the validity of any appointment heretofore made by the Board, or the conduct of any receivership or conservatorship existing at the time of such amendment, or the procedure to be followed under any such appointment, unless the amendment expressly so states, except that, to the extent not otherwise specified in any statute, rule, regulation, order or plan governing such appointment and actions thereunder, the titles, rights, powers, privileges, and immunities specified in these rules and regulations, as from time to time amended, shall be deemed interpretative of the statutes, rules, regulations, orders, and plans governing such appointments and actions thereunder. Any temporary conservator in possession of any Federal savings and loan association shall continue as such temporary conservator pursuant to the order of appointment and rules and regulations in effect at the time of such appointment, and shall be succeeded by a receiver or conservator or the affairs of the association shall be otherwise disposed of as provided in such order and rules and regulations: *Provided, however,* That any receiver or conservator who shall replace or succeed such temporary conservator, except another temporary conservator, shall, upon appointment, have and possess all the rights, powers, privileges, and immunities, and shall be subject to the duties and liabilities vested and imposed on a receiver or conservator by these rules and regulations as amended, but the causes for the appointment of a receiver or conservator in place of such temporary conservator shall be those specified by the rules and regulations in effect at the time of the appointment of such temporary conservator. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

PART 207—POWERS OF CONSERVATOR AND CONDUCT OF CONSERVATORSHIPS

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207.1. Take possession, when.—Upon appointment, the conservator for a Federal association shall forthwith take possession of the books, records, and assets of every description of such association. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.2. Procedure upon taking possession.—Upon taking possession, pursuant to section 207.1 of these rules and regulations, of such Federal association, the conservator shall forthwith:

(a) Notify, by written notice served personally or by registered mail or telegraph, all banks, trust companies and all other individuals, partnerships, corporations, and associations known to such conservator to be holding or in possession of any assets of such association.

(b) File with the Secretary of the Federal Home Loan Bank Administration a statement (1) that he has taken possession, pursuant to section 207.1 of these rules and regulations, of such Federal association and (2) of the time of such taking of possession; and such statement shall be conclusive evidence of such taking of possession and of the time of such taking of possession, and

(c) If the ground, or one of the grounds, of his appointment is the ground set forth in subdivision numbered (4) of section 206.1 of these rules and regulations, post a notice in substantially the following form on the door of the home office of such association:

.....Federal Savings and Loan Association.....
,, is in the possession and charge
 of the undersigned as Conservator under appointment by
 the Federal Home Loan Bank Administration.

.....
 (Date) (Conservator)

(Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.3. Succession.—Immediately upon taking possession, pursuant to section 207.1 of these rules and regulations, of such Federal association, the conservator shall succeed to all the rights, powers, and privileges of the Federal association, its officers and directors, or any of them. Such officers and directors, or any of them, shall not thereafter have, exercise, or act in connection with, any such rights, powers or privileges, or any asset or property of any nature of the association; *Provided, however*, That nothing herein shall deny to such officers and directors the right from time to time to address such petitions, authorized by the board of directors, as they may have to the Federal Home Loan Bank Administration or its representatives designated to receive such petitions concerning such association, or to represent the association at hearings provided for in these rules and regulations. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.4. Disposition.—The Federal Home Loan Bank Administration may, at any time, order the association returned to its management and may, before returning the association to its management regardless of whether such association is subsequently returned to its management, order a meeting of the shareholders for any purpose, including, without any limitation on the generality of the foregoing, election of new directors, or of the board of directors for any purpose, including, without any limitation on the generality of the foregoing, the filling of vacancies on the board of directors or the election of new officers, or may order meetings of both members and directors.

Each such election shall be supervised by a representative of the Federal Home Loan Bank Administration. The Federal Home Loan Bank Administration may at any time, without further hearing as provided in section 206.2 of these rules and regulations, replace the conservator by appointing the Federal Savings and Loan Insurance Corporation as receiver for the purpose of liquidation. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.5. Powers and duties of conservator.—The conservator, subject to the direction and supervision of the Governor of the Federal Home Loan Bank System, shall, after taking possession pursuant to section 207.1 of these rules and regulations, take such action as may be necessary to conserve the assets of the association pending further disposition of its affairs. The conservator shall forthwith in his name, in the name of the association, in the name of both, or otherwise, collect all obligations and money due the association, and in his name, in the name of the association, in the name of both, or otherwise.

(a) May do all things desirable or expedient in his discretion to carry on the business of the association to an extent consistent with his appointment and to preserve and conserve the assets and property of every nature of such association;

(b) May exercise all the rights and powers of such association, including, without any limitation on the generality of the foregoing, any rights and powers under any mortgage, deed of trust, chose in action, option, collateral note, contract, judgment or decree, share or certificate of share of stock, or instrument of any nature;

(c) May, with the approval of the Federal Home Loan Bank Administration or of said Governor, pay off and discharge any taxes, assessments, liens, claims, or charges of any nature against the association or the conservator or any asset or property of any nature of such association;

(d) May pay out and expend such sums as he shall deem necessary or advisable

(1) For or in connection with the preservation, maintenance, conservation, or protection, or

(2) With the approval of the Federal Home Loan Bank Administration or of said Governor for or in connection with the remodeling, repair, rehabilitation, or improvement

not necessary for such preservation, maintenance, conservation, or protection

of any asset or property of such association;

(e) May, with the approval of the Federal Home Loan Bank Administration or of said Governor,

(1) Pay out and expend such sums as he shall deem necessary or advisable for or in connection with the preservation, maintenance, conservation, or protection of, or

(2) Pay off and discharge any taxes, assessments, liens, claims, or charges of any nature against

any asset or property of any nature on which the association or conservator has a lien by way of mortgage, deed of trust, pledge or otherwise, or in which the association or conservator has an interest of value of any nature;

(f) May, under the direction and supervision of the General Counsel of the Federal Home Loan Bank Administration, institute, prosecute, maintain, defend, intervene, and otherwise participate in any and all actions, suits, or other legal proceedings by and against the conservator or association or in which the conservator, the association, or its creditors or members, or any of them, shall have an interest, and in every way to represent such association, its members and creditors;

(g) (1) May, with the approval of said Governor, employ such assistants and employees as he may deem necessary for the proper administration of the conservatorship, and shall by bond cover all such assistants and employees in form satisfactory to such conservator and to the said Governor, the cost of the same and the cost of the conservator's bond to be paid out of the assets of the association in the possession of the conservator; and (2) shall employ any attorney or attorneys designated by the General Counsel of the Federal Home Loan Bank Administration, in connection with litigation or otherwise to give legal advice and assistance, for the conservatorship generally or in particular instances, and pay retainers and compensation of such attorney or attorneys, together with all expenses, including, but not limited to, the costs and expenses of any litigation, as approved by said General Counsel, out of the assets of the association;

(h) May execute, acknowledge, and deliver any and all deeds, contracts, leases, assignments, bills of sale, releases, extensions, satisfactions, and other instruments necessary

or proper for any purposes, including, without any limitation on the generality of the foregoing, the effectuation or termination of any sale, lease, or transfer of real, personal, or mixed property. Any deed or other instrument executed pursuant to the authority hereby given shall be as valid and effectual for all purposes as if the same had been executed, as the act and deed of the association or otherwise, by the officers of such association by authority of its board of directors;

(i) Shall immediately transfer the depository bank balances of the association to account "R" hereinafter provided for, or to the account with the Federal Home Loan Bank, of which the association is a member, hereinafter provided for, and, unless otherwise directed by the Federal Home Loan Bank Administration or said Governor, shall open two accounts in banks insured by the Federal Deposit Insurance Corporation, as follows:

(1) One of these accounts shall be known as account "R" and the other shall be known as account "D."

(2) All funds of the association coming into the possession of the conservator shall be forthwith deposited in account "R."

(3) Disbursements shall be made from account "R" only by transfer to an account with the Federal Home Loan Bank of which the association is a member, which transfer may be made by the conservator.

(4) Deposits shall be made in account "D" only by order of or with the approval of the Federal Home Loan Bank Administration or the Governor.

(5) The conservator may make disbursements in connection with his duties as conservator from account "D."

(6) All depository bank accounts of the conservator shall be carried as follows:

....., Conservator
(Name of conservator)

for
(Name of association)

(j) (1) May, with the approval of the Federal Home Loan Bank Administration or said Governor, sell for cash any mortgage, deed of trust, chose in action, bond, note, contract, judgment or decree, or share or certificate of share

of stock or debt, owing to such association, at not less than the actual amount owing the association thereon or the face or par value thereof, and

(2) May, with the approval of the Federal Home Loan Bank Administration, or on terms and conditions approved by the Federal Home Loan Bank Administration, sell for cash or on terms, or exchange or otherwise dispose of, at less than the amount owing the association thereon or the face or par value thereof, in whole or in part, any mortgage, deed of trust, chose in action, bond, note, contract, judgment or decree, share or certificate of share of stock or debt, owing to such association;

(k) (1) May lease on a month to month basis, or for a term of not to exceed 1 year, and

(2) May, with the approval of the Federal Home Loan Bank Administration, or on terms and conditions approved by the Federal Home Loan Bank Administration, sell for cash or on terms, lease for a period of more than 1 year, exchange or otherwise dispose of, in whole or in part,

any or all of the assets and property of the association, real, personal, and mixed, tangible and intangible, of any nature;

(l) May, with the approval of the Federal Home Loan Bank Administration or of said Governor, or on terms and conditions approved by the Federal Home Loan Bank Administration or said Governor, surrender, abandon, and release any choses in action, or other assets or property of any nature, whether the subject of pending litigation or not, and reject or repudiate any lease or contract which he considers burdensome;

(m) May, with the approval of the Federal Home Loan Bank Administration, or on terms and conditions approved by the Federal Home Loan Bank Administration, settle, compromise, or obtain the release of, for cash or other considerations, claims and demands against such association or the conservator;

(n) May, with the approval of the Federal Home Loan Bank Administration, or on terms and conditions approved by the Federal Home Loan Bank Administration, settle, compromise, or release, for cash or other considerations, claims, and demands in favor of the association or the conservator;

(o) May, with the approval of the Federal Home Loan Bank Administration, and on terms and conditions approved by the Federal Home Loan Bank Administration, borrow money in any amount and from any source and in any manner, and execute, acknowledge, and deliver notes, certificates, and other evidence of indebtedness therefore and secure the repayment thereof by the mortgage, pledge, assignment in trust, or hypothecation of any or all of the property, whether real, personal, or mixed, of such association, and such borrowing may be for any purpose, including, without any limitation on the generality of the foregoing, protecting, or preserving the assets in his possession, declaring and paying dividends to members and creditors, providing for the expense of administration, or aiding in the reopening or reorganization of such association;

(p) May pay out of the assets of the conservatorship all costs and expenses of the conservatorship and all costs of carrying out or exercising his rights, powers, privileges, and duties as conservator, all as determined by him, except as otherwise provided herein; and

(q) May do such things, and have such rights, powers, privileges, immunities, and duties, whether or not otherwise granted in these rules and regulations, as shall be authorized, directed, conferred, or imposed from time to time in specific cases by order of the Federal Home Loan Bank Administration, or by amendment of these rules and regulations.

For the purposes of this section, (1) asset and property including any mortgage, deed of trust, chose in action, bond, note, contract, judgment or decree, share or certificate of share of stock, or debt of the association, and right and power of the association, shall include any such asset or property, right or power of the conservator, and (2), the terms "Governor of the Federal Home Loan Bank System" and "said Governor" shall include any Deputy or Assistant Governor of the Federal Home Loan Bank System. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.6. Creditors.—The conservator may, after certification by the conservator to the Federal Home Loan Bank Administration that the assets of the association will be sufficient to meet all creditor obligations and that the condition of the association justifies, out of the assets in his possession,

(a) With the approval of the Governor of the Federal Home Loan Bank System, or any Deputy or Assistant Governor, make disbursements which the association was obligated to make on loan commitments and other valid contracts,

(b) With the approval of said Governor, pay salaries due officers or employees of the association, permit the payment of outstanding checks given in connection with valid creditor obligations, and pay valid creditor obligations,

or, in the absence of such certification or approval, may, out of the assets of the association in his possession, pay creditor obligations and make disbursements which the association was obligated to make on loan commitments, to the extent determined by said Governor to be compatible with the condition of the association and the proper conduct of its affairs. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529).

207.7 Share interests.—The conservator shall not accept any payments on or purchases, or make any repurchases, of share accounts, unless the Federal Home Loan Bank Administration shall otherwise direct by order, which order, or orders, shall be posted in a *conspicuous place in the* principal office of the conservator for conducting the affairs of the association, and such payments or purchases shall be accepted, or such repurchases made, only to the extent and in the manner, and with segregation to the extent, that the same, if any, may be directed in such order or orders. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.8. Examinations, inventories, reports, costs and expenses— (a) Inventory.—As soon as practicable after taking possession, the conservator shall make an inventory of the assets of such association as of the date of such taking possession, showing the value as carried on the books of the association, and the security therefor, if any, in whatever form the same shall exist, with a brief description of each such asset and such security. Such assets may be listed in such groups or classes as shall, to the satisfaction of the Governor of the Federal Home Loan Bank System, or any Deputy or Assistant Governor, afford full information as to their character and book value, and the conservator shall include a record of the creditor and share liabilities

of the association. One copy of such inventory shall promptly be filed with the Secretary to the Federal Home Loan Bank Administration, one copy with the Office of the Governor of the Federal Home Loan Bank System, and one copy shall be retained in the principal office of the association, so long as such office is maintained by the conservator.

(b) Examinations and audits.—Each Federal association for which a conservator has been appointed may be examined and/or audited (with appraisals when deemed advisable by the Federal Home Loan Bank Administration) by the examining division of the Federal Home Loan Bank Administration as directed by the Federal Home Loan Bank Administration. The cost, as determined by the Federal Home Loan Bank Administration, of examinations including office analysis thereof, audits, and any appraisals made in connection therewith, shall be paid from the assets of the association unless otherwise ordered by the Federal Home Loan Bank Administration.

(c) Forms and reports.—The conservator shall follow such accounting practices as may, from time to time, be prescribed by the Governor. The conservator shall make such reports as may be required by the Federal Home Loan Bank Administration or the Governor. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.9. Final discharge and release of conservator—(a) Final report.—At such time as the conservator be relieved of his duties, the conservator shall file with the Federal Home Loan Bank Administration a detailed report in form satisfactory to the Federal Home Loan Bank Administration.

(b) Final discharge.—Unless otherwise directed by the Federal Home Loan Bank Administration, upon the completion of the duties of the conservator or at such time as the conservator shall be otherwise relieved of his duties, an examination and audit may be directed by the Federal Home Loan Bank Administration in connection with the report of the conservator hereinbefore required. The accounts of the conservator shall be approved or disapproved, and, if approved, the conservator shall thereupon be given a complete and final discharge and release. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.10. Inspection of reports.—All inventories, statements, and reports of the conservator shall be in at least four copies unless otherwise directed by the Federal Home Loan Bank Administration or the Governor. One copy shall be filed with the Federal Home Loan Bank Administration, the other copies with the Office of the Governor of the Federal Home Loan Bank System, and each of the inventories, statements, and reports shall constitute permanent records of each conservatorship open for inspection at such times and on such conditions as may be from time to time directed by the Federal Home Loan Bank Administration or, in the absence of such directions, whenever the office of the Secretary of the Federal Home Loan Bank Administration shall be open for business. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.11. Authority of officers.—Any authority or requirement under section 207.5 through section 207.10 of the rules and regulations for the Federal Savings and Loan System for action, by order or otherwise, by the Federal Home Loan Bank Administration, or by the Governor, a Deputy Governor, or an Assistant Governor, may be performed by the Governor, a Deputy Governor, or an Assistant Governor. Without any limitation on the applicability of this section to other conservatorships, this section shall apply to any conservatorship existing at the time of the amendment effected by the adoption of this section, and to the conduct of and procedure under any conservatorship so existing. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C., 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

207.12. Delegation by conservator.—The conservator may delegate to such persons as he may designate any or all of the powers and authorities vested in the conservator by or under sections 207.3, 207.5, 207.6, and 207.7 of these regulations. Without any limitation on the applicability of this section to other conservatorships, this section shall apply to any conservatorship existing at the time of the amendment effected by the adoption of this section, and to the conduct of and procedure under any conservatorship so existing. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d); E. O. 9070, 7 F. R. 1529.)

208.1. Take possession, when.—The Federal Savings and Loan Insurance Corporation upon appointment as receiver for a Federal association shall forthwith take possession of the books, records and assets of every description of

such association. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d).)

208.2. Procedure upon taking possession.—Upon taking possession, pursuant to § 208.1 of these rules and regulations, the receiver shall forthwith—

(a) Post a notice in substantially the following form on the door of the home office of such association:

_____Federal Savings and Loan Association _____,
is in the hands of the Federal Savings and Loan Insurance Corporation as receiver under appointment by the Federal Home Loan Bank Board.

FEDERAL SAVINGS AND LOAN INSURANCE
CORPORATION AS RECEIVER.

_____ By _____
Date (Title)

(b) Notify, by written notice served personally or by registered mail or telegraph, all banks, trust companies, and all other individuals, partnerships, corporations, and associations known to it to be holding or in possession of any assets of such association; and

(c) File with the Secretary of the Board a statement (1) that it has taken possession, pursuant to §204.6 of these rules and regulations, of such Federal association, and (2) of the posting and time of posting of the notice pursuant to the provisions of paragraph (a) of this Section, together with a copy of such notice; and such statement shall be conclusive evidence of the posting and time of posting of such notice. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d).)

208.3. Succession.—Immediately upon the posting of the notice on the door of such Federal association as provided in paragraph (a) of §208.2 of these rules and regulations, the receiver, by operation of law and without any conveyance or other instrument, act or deed, shall succeed to all the rights, titles, powers, and privileges of the Federal association, its officers and directors, or any of them. Such officers and directors, or any of them, shall not thereafter have, exercise, or act in connection with, any such rights, titles, powers, or privileges, or any asset or property of any nature of the association; *Provided, however,* That nothing herein shall deny to such officers and directors the right from time to time to address such petitions, authorized by the board of directors, as they

may have to the Board or its representatives designated to receive such petitions concerning such association, or to represent the association at hearings provided for in these rules and regulations. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d).)

208.4. Disposition.—Unless the Board shall otherwise order, the receiver shall, within 20 days of its appointment, recommend to the Board a plan for the reorganization, consolidation, merger, or liquidation or other disposition of the association. Such recommended plan may provide that the receiver as such may (1) take over the assets of and operate the association, (2) take such action as may be necessary to put it in a sound and solvent condition, (3) merge it with another insured institution, (4) organize a new Federal savings and loan association to take over its assets, or (5) proceed to liquidate its assets in an orderly manner. The Board shall thereupon adopt a plan which may provide for the reorganization, consolidation, merger, liquidation, or other disposition of the association, which plan, including any amendments thereto and substitutions therefor ordered at any time by the Board, shall be carried into effect by the receiver. The facilities of the Board and of the Home Owners' Loan Corporation may be availed of in carrying out the plan. The Board may, at any time, order the association returned to its management and may, before returning the association to its management, regardless of whether such association is returned to its management, order a meeting of the shareholders for any purpose, including, but not limited to, election of new directors, or of the board of directors for any purpose, including, but not limited to, the filling of vacancies on the board of directors or the election of new officers, or may order meetings of both members and directors. Each such election shall be supervised by a representative of the Board. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d).)

208.5. Powers and duties of receiver.—The receiver, after posting notice pursuant to paragraph (a) of § 208.2 of these rules and regulations, shall, in its name, in the name of the association, in the name of both, or otherwise, collect all obligations and money due such association, and may, in its name, in the name of the association, in the name of both, or otherwise:

(a) Do all things desirable or expedient in its discretion to carry on the business of such association to an extent con-

sistent with its appointment and to preserve and conserve the assets and property of every nature of such association;

(b) Exercise all the rights and powers of such association, including, without any limitation on the generality of the foregoing, any rights and powers under any mortgage, deed of trust, chose in action, option, collateral note, contract, judgment or decree, share or certificate of share of stock, or instrument of any nature;

(c) Pay off and discharge any taxes, assessments, liens, claims, or charges of any nature against the association or the receiver or any asset or property of any nature of such association;

(d) Pay out and expend such sums as it shall deem necessary or advisable for or in connection with the preservation, maintenance, conservation, protection, remodeling, repair, rehabilitation, or improvement of any asset or property of any nature of such association;

(e) Pay out and expend such sums as it shall deem necessary or advisable for or in connection with the preservation, maintenance, conservation, or protection of, or pay off and discharge any taxes, assessments, liens, claims, or charges of any nature against, any asset or property of any nature on which the association or the receiver has a lien by way of mortgage, deed of trust, pledge, or otherwise, or in which the association or receiver has an interest of value of any nature;

(f) Institute, prosecute, maintain, defend, intervene, and otherwise participate in any and all actions, suits, or other legal proceedings by and against the receiver or association or in which the receiver, the association, or its creditors or members, or any of them, shall have an interest, and in every way to represent such association, its members and creditors;

(g) Employ any attorney or attorneys, in connection with litigation or otherwise to give legal advice and assistance, for the receivership generally or in particular instances, and pay retainers and compensation of such attorney or attorneys, together with all expenses, including, but not limited to, the costs and expenses of any litigation, out of the assets of the association;

(h) Execute, acknowledge, and deliver any and all deeds, contracts, leases, assignments, bills of sale, releases, extensions, satisfactions, and other instruments necessary or

proper for any purposes, including without any limitation on the generality of the foregoing the effectuation or termination of any sale, lease, or transfer of real, personal or mixed property, or that shall be necessary or proper to liquidate or carry on the business of such association. Any deed or other instrument executed pursuant to the authority hereby given shall be as valid and effectual for all purposes as if the same had been executed, as the act and deed of the association or otherwise, by the officers of such association by authority of its board of directors;

(i) Deposit the moneys and funds in any bank or banks insured by the Federal Deposit Insurance Corporation or in any Federal Home Loan Bank, or any other banks or other depositories approved for such purposes by the Board;

(j) Sell for cash or on terms, exchange, or otherwise dispose of, in whole or in part, any mortgage, deed of trust, chose in action, bond, note, contract, judgment or decree, share or certificate of share of stock or debt, owing to such association;

(k) Sell for cash or on terms, exchange or otherwise dispose of, in whole or part, any or all of the assets and property of the association, real, personal, and mixed, tangible and intangible, of any nature;

(l) Surrender, abandon, and release any choses in action, or other assets or property of any nature, whether the subject of pending litigation or not, and reject or repudiate any lease or contract which it considers burdensome;

(m) Settle, compromise, or obtain the release of, for cash or other considerations, claims and demands against such association or the receiver;

(n) Settle, compromise, or release, for cash or other considerations, claims and demands in favor of the association or the receiver;

(o) With the approval of the Board and on terms and conditions approved by the Board, borrow money in any amount and from any source and in any manner, and execute, acknowledge and deliver notes, certificates, and other evidence of indebtedness therefor, and secure the repayment thereof by the mortgage, pledge, assignment in trust or hypothecation of any or all of the property, whether real, personal, or mixed, of such association, and such borrowing may be for any purpose, including, without any limita-

tion on the generality of the foregoing, facilitating liquidation, carrying on the business of such association, protecting or preserving the assets in its possession, declaring and paying dividends to members and creditors, providing for the expense of administration and liquidation, or aiding in the reopening or reorganization of such association;

(p) Pay out of the assets of the receivership all costs and expenses of the receivership and all costs of carrying out or exercising its rights, powers, privileges, and duties as receiver, all as determined by it, except as otherwise provided herein; and

(q) Do such things, and have such rights, powers, privileges, immunities, and duties, whether or not otherwise granted in these rules and regulations, as shall be authorized, directed, conferred, or imposed from time to time in specific cases by order of the Board, or by amendment of these rules and regulations. For the purposes of this section, asset and property including any mortgage, deed of trust, chose in action, bond, note, contract, judgment or decree, share or certificate of share of stock, or debt of the association, and right and power of the association, shall include any such asset or property, right, or power of the receiver. (Sec. 5 (a), (d), of H. O. L. A. of 1933, 48 Stat. 132, 133; 12 U. S. C. 1464 (a), (d).)

208.7. Share interest claims.—(a) In the event the Board shall adopt a plan providing for the liquidation of the association, as provided in § 208.4 of these rules and regulations, the receiver shall, within one year from the date of such appointment, publish, in a newspaper printed in the English language and of general circulation in the city or county in which the home office of such Federal association is located, a notice to all shareholders of such Federal association to present their sworn proofs of claim of ownership thereof to such receiver on or before a date specified in such notice. The date specified in such notice shall be not less than 5 years after the date of the appointment of the receiver. Such notice shall urge that claims of ownership be presented promptly and shall be similarly published on dates approximately 1 year and 2 years respectively after the date of such first publication. Claims of ownership not filed within the period stated in the notice shall be disallowed, except as they may thereafter be approved by the Board for payment in whole or in part out of the assets of said Federal association remaining undistributed at the time of such approval. The receiver shall mail a similar notice

to any shareholder, shown to be such on the books of the association in the possession of the receiver, at the last address of such shareholder as the same shall appear on such books: *Provided, however,* That such notice need not be mailed to the holder of a share account that has been surrendered and transferred to the Federal Savings and Loan Insurance Corporation. At the time of the declaration of the first liquidating dividend, the receiver shall credit to a special reserve the proportionate shares of such liquidating dividend otherwise payable to the holders of unclaimed share accounts shown on the books of the association which appear to be outstanding and valid, and similar credits shall from time to time be made for any subsequent liquidating dividends as the same may be declared before the date specified in the notice hereinbefore provided for. The final liquidating dividend to shareholders whose claims of ownership have been allowed may include any sums held in such accounts or any portion thereof, but such dividend shall in no event be paid before the date specified in the notice hereinbefore provided.

(b) Any share ownership proved to the satisfaction of the receiver shall be allowed by the receiver. The receiver may disallow in whole or in part any claim of share interest not proved to its satisfaction, and notice of such disallowance together with reason therefor shall be served by the receiver upon the claimant. The mailing of notice of such disallowance to the last known address of any claimant appearing on the books or proof of claim shall be deemed sufficient for the purposes hereof. Unless such claimant shall file with the Board written request for payment regardless of such disallowance or rejection by the receiver within 30 days after the mailing of such notice (Sundays and holidays included), such disallowance or rejection shall be final except as the Board shall otherwise determine in its discretion.

(c) Upon the expiration of the time fixed for the presentation of claims of share interest by the notice provided for in paragraph (a) hereof, the receiver shall cause to be filed with the Board a full and complete list of such claims presented. Such list shall indicate the character of each claim therein listed and whether or not allowed by the receiver. At such other date or dates as may be ordered by the Board or determined by the receiver, a list of claims presented before such date shall be filed with the Board.

APPENDIX C

ORDERS OF HOME LOAN BANK BOARD (OR FEDERAL HOME LOAN
BANK ADMINISTRATION)

FEDERAL HOME LOAN BANK ADMINISTRATION

Order No. 5082. Date March 29, 1946

WHEREAS, it has been and is hereby determined that the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act, as amended, will be aided by the action contemplated herein; now, therefore,

IT IS HEREBY ORDERED That effective March 29, 1946, the Federal Home Loan Bank of Los Angeles shall be liquidated and reorganized and all assets and property of any kind or nature of such bank, including any unexpended amounts in approved and outstanding budgets and personnel but excluding officers and directors, are hereby transferred to the Federal Home Loan Bank of Portland and all the liabilities and obligations of such Federal Home Loan Bank of Los Angeles are to be assumed by the Federal Home Loan Bank of Portland and are hereby declared to be and become the liabilities and obligations of the Federal Home Loan Bank of Portland. The President of the Federal Home Loan Bank of Portland (hereinafter called Federal Home Loan Bank of San Francisco) is hereby authorized and directed to execute, issue or sign in the name of the Federal Home Loan Bank of Los Angeles or in the name of the Federal Home Loan Bank of San Francisco as the successor and legal assignee of the assets, property, liabilities and obligations of the Federal Home Loan Bank of Los Angeles such instrument or instruments as may be necessary or advisable and to cancel, assign or otherwise dispose of in whole or in part, any lease under which the Federal Home Loan Bank of Los Angeles has been bound or committed. All members of the Federal Home Loan Bank of Los Angeles are to become members of the Federal Home Loan Bank of Portland and the Federal Home Loan Bank of Portland (hereinafter called Federal Home Loan Bank of San Francisco) is ordered and directed to issue appropriate evidences of the ownership of all of the stock formerly held by the Federal Home Loan Bank of Los Angeles including stock purchased and held on behalf of the U. S. Government. The charter of said Federal Home Loan Bank of Los Angeles is hereby cancelled.

IT IS FURTHER ORDERED AND DIRECTED That effective March 29, 1946, the said Federal Home Loan Bank of Portland shall move and is hereby moved to the city of San Francisco, California, and shall be known hereafter as the Federal Home Loan Bank of San Francisco. Subject to the Federal Home Loan Bank Act, as amended, and the charter and by-laws of the Federal Home Loan Bank of San Francisco, including right of dismissal, said bank shall have as its directors, officers, employees, attorneys, and agents the directors, officers, employees, attorneys, and agents transferred, elected, designated, or appointed, to, by or for the Federal Home Loan Bank of Portland for the calendar year 1946 and shall operate under the charter and by-laws used by the Federal Home Loan Bank of Portland until duly changed.

IT IS FURTHER ORDER AND DIRECTED That effective March 29, 1946, and until changed by the Board of Directors of the Federal Home Loan Bank of San Francisco and approved by the Federal Home Loan Bank Administration, the said Federal Home Loan Bank of San Francisco shall maintain a branch of said bank in the cities of Portland, Oregon, and Los Angeles, California.

IT IS FURTHER ORDERED AND DIRECTED That in order to provide for adequate representation of the states in the Federal Home Loan Bank of San Francisco region, effective August 1, 1946, the terms of all directors of said bank shall expire and that prior to July 1, 1946, a new election of directors shall be held. The terms of all officers of said bank shall expire upon the designation by the Board of Directors after August 1, 1946, of new officers and their approval by the Federal Home Loan Bank Administration. In such election and in future elections of the Federal Home Loan Bank of San Francisco the states of Nevada and Arizona shall constitute one state with the right of minimum representation to be alternated between each of said states within the rules and regulations and orders of the Federal Home Loan Bank System providing for a minimum representation from each state in a Federal Home Loan Bank district. On or before July 1, 1946, the Federal Home Loan Bank Administration shall appoint or reappoint four public-interest directors whose terms shall begin August 1, 1946, but shall end respectively December 31, 1946; December 31, 1947; December 31, 1948; and December 31, 1949.

IT IS FURTHER ORDERED AND DIRECTED That the Federal Home Loan Bank of San Francisco shall take such other action subject to the approval of the Federal Home Loan Bank Administration as may be necessary or desirable for the effective operation of the Federal Home Loan Bank of San Francisco.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on March 29, 1946.

_____,
Secretary.

FEDERAL HOME LOAN BANK ADMINISTRATION

Order No. 5083. Date March 29, 1946

Pursuant to Section 3 of the Federal Home Loan Bank Act, as amended, and the powers vested in me by law, the district of the Federal Home Loan Bank of Portland is readjusted and shall have added thereto the states of Arizona, California and Nevada, and the Territory of Hawaii.

The said Federal Home Loan Bank of Portland is moved to San Francisco and shall be known as the Federal Home Loan Bank of San Francisco.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on March 29, 1946.

_____,
Assistant Secretary.

FEDERAL HOME LOAN BANK ADMINISTRATION

Order No. 5084. Date March 29, 1946

Pursuant to Section 25 of the Federal Home Loan Bank Act, as amended, and the powers vested in me by law the Federal Home Loan Bank of Los Angeles is dissolved.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on March 29, 1946.

_____,
Assistant Secretary.

FEDERAL HOME LOAN BANK ADMINISTRATION

Order No. 5254. Date May 20, 1946

WHEREAS, it has been determined that the Long Beach Federal Savings and Loan Association, Long Beach, California:

Is conducting its business in an unlawful manner;

Is conducting its business in an unauthorized manner;

Is conducting its business in an unsafe manner;

Has a management which is unsafe to manage a Federal savings and loan association;

Has a management which is unfit to manage a Federal savings and loan association;

Is pursuing a course that is jeopardizing the interests of its members;

Is pursuing a course that is jeopardizing the interests of its creditors;

Is pursuing a course that is jeopardizing the interests of the public;

Is pursuing a course that is injurious to the interests of its members;

Is pursuing a course that is injurious to the interests of its creditors;

and

Is pursuing a course that is injurious to the interests of the public;

and

WHEREAS, it has been determined to be in the interest of said association, its members, creditors, and the public to appoint a conservator to take possession of said association and to conserve its assets pending further disposition of said association and its affairs:

NOW, THEREFORE, A. V. Ammann is hereby appointed conservator for the Long Beach Federal Savings and Loan Association, Long Beach, California, to take possession of said association and to conserve its assets pending further disposition of said association and its affairs; and, as such conservator, to have and exercise all of the powers and rights, enjoy all of the privileges, and assume and perform all of the duties and responsibilities of his office accorded or imposed by law, the Rules and Regulations for the Federal Savings and Loan System, and orders issued by the Federal Home Loan Bank Administration, or otherwise.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on May 20, 1946.

_____,
Secretary.

MORE DEFINITE STATEMENT OF THE CAUSES FOR THE APPOINTMENT ON MAY 20, 1946, OF THE CONSERVATOR FOR LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, LONG BEACH, CALIFORNIA

T. A. Gregory
350 East Fourth Street
Long Beach 2, California

The following is a more definite statement of the causes for the appointment on May 20, 1946, of a Conservator of the Long Beach Federal Savings and Loan Association:

1. Said Association, in the opinion of the Federal Home Loan Bank Administration, was conducting its business in an unlawful, unauthorized, and unsafe manner, and was pursuing a course that was jeopardizing and injurious to the interests of its members, creditors, and the public in that:

(a) During the period from September 11, 1945, to March 7, 1946, disbursements of funds of said Association totaling \$14,500 were made to its President, T. A. Gregory, without proper voucher therefor, or explanation thereof in the records of the Association, itemized as follows:

September 11, 1945, T. A. Gregory	\$1000.00
October 22, 1945, Wired to T. A. Gregory, Wash., D. C.	1000.00
November 5, 1945, Wired to T. A. Gregory, Wash., D. C.	1000.00
November 24, 1945, T. A. Gregory	1000.00
December 1, 1945, Wired to T. A. Gregory, Wash., D. C.	2000.00
January 19, 1946, T. A. Gregory	2000.00
January 31, 1946, Cash (Wired to T. A. Gregory)	1500.00
February 20, 1946, Cash (Wired to T. A. Gregory at Wash., D. C.)	2000.00
February 28, 1946, Cash (Wired to T. A. Gregory at Wash., D. C.)	2000.00
March 7, 1946, Cash (Wired to T. A. Gregory at Wash., D. C.)	1000.00

Total	\$14,500
-------------	----------

(b) Disbursements totaling \$14,500, itemized under (a), were used for purposes beyond the scope of the Association's business.

(c) Funds of the said Association totaling \$2455.60 were disbursed to Howard S. Leroy, an attorney at law at Washington, District of Columbia, on or about January 30, 1946, January 31, 1946, and March 6, 1946, although said attorney had not been retained by the said Association, nor were such funds paid to said attorney for the handling of any business of the said Association, or otherwise for the benefit of said Association.

(d) The Board of Directors of said Association attempted in the following manner to relieve T. A. Gregory from accountability to the said Association for its funds used by him for purposes beyond the scope of the said Association's business:

(1) The said Board of Directors, according to the minutes of a special meeting, dated January 16, 1946, voted to compensate T. A. Gregory retroactively in the sum of \$11,750 for services rendered by him in 1945, for which the said T. A. Gregory had already been paid in accordance with the terms of his employment.

(2) The said Board of Directors, according to the minutes of the special meeting, dated January 16, 1946, voted to increase T. A. Gregory's salary from \$8250 to \$20,000 per year.

(3) On April 6, 1946, reimbursement of said Association's funds paid to T. A. Gregory and used by him for purposes beyond the scope of the Association's business, was recorded on the books of said Association by means of an offset against the purported liability of the Association to T. A. Gregory for the said sum of \$11,750 and for the voted increase for the first three months of 1946.

(e) The Association, by vote of its Board of Directors, purportedly on January 16, 1946, undertook to compensate T. A. Gregory retroactively in the sum of \$11,750 for services rendered by him in 1945, for which the said T. A. Gregory had already been paid in accordance with the terms of his employment, said purported retroactive salary increase being unlawful and unauthorized.

(f) The Association paid salaries and fees which were excessive and not commensurate with the services rendered.

(g) The Board of Directors of said Association on May 8, 1946, appropriated the sum of \$100,000 of the funds of said Association for the purpose of restraining the proper use of safeguards and controls provided by the Congress of the United States with respect to Federal Savings and Loan Associations, and threatened the removal of said sum from the proper control of said Association.

(h) During the course of a regular examination commencing on May 18, 1946, by Examiners of the Federal Home Loan Bank Administration, a director and officer of the said Association unlawfully and improperly removed a cashier's check in the amount of \$50,000, payable to the said Association and representing funds belonging to it, without accounting therefor.

(i) On or about May 8, 1946, the said Association, through its officers, executed a purported lease on a hotel property located at 332 American Avenue, Long Beach, California, owned by it to one George Turner for a 20-year period on terms which, in effect, would give to the said Turner the use of said property without adequate consideration therefor to the said Association.

(j) Said Association was being used for the personal gain of one or more officers and directors thereof, to the detriment of its members and creditors.

(k) Said Association, through its officers, engaged in activities which were inimical to the interests of veterans of the Armed Forces, including veterans of the Armed Forces who were members of the said Association.

(l) Certain directors of the said Association, namely: T. A. Gregory, J. E. Gregory, M. T. Killingsworth and S. I. Bacon, on or about May 18, 1946, undertook to convert, or attempted to convert, their shareholdings and other funds totaling approximately \$21,000 into approximately 21,000 separate purported share accounts of \$1.00 each, in violation of the rights of over 16,000 share account holders of said Association, and in violation, or attempted violation of their duties as directors.

(m) Said Association failed to file copies of audit of said Association made by F. W. Lafrentz & Co., Certified Public Accountants, Los Angeles, California, as of the close of business May 19, 1945, or thereabouts, as required by Section 203.2 of the Rules and Regulations for the Federal Savings and Loan System.

(n) The said Association failed to maintain its books of accounts and records correctly.

(o) The records or statements of the Association were falsified in that either

(1) The minutes of the Board of Directors' meeting of January 16, 1946, were falsified by the entry therein of actions by said Board purporting to have been taken increasing T. A. Gregory's salary from \$8250 to \$20,000 per year, and purporting to authorize the payment of \$11,750 to T. A. Gregory as extra compensation for the year 1945. or

(2) The said Association's liabilities were misrepresented by the Board of Directors to the Federal Home Loan Bank Administration in monthly reports for the months ending January 31, 1946, February 28, 1946 and March 30, 1946.

2. Said Association, in the opinion of the Federal Home Loan Bank Administration, had a management which was unfit and unsafe to manage a Federal Savings and Loan Association in that, among other things,

(a) The matters set forth in sub-items (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and (o) of Item 1, above are herein incorporated by reference.

(b) T. A. Gregory in 1934 (but only recently known to the Federal Home Loan Bank Administration) acquired control of the Reliable Building-Loan Association, Long Beach, California, and so manipulated its affairs that he was enabled to acquire, through the medium of Somerset Finance Co., a substantial number of certificates of the Reliable Building-Loan Association at a small fraction of their true value, and subsequently redeemed said certificates at the Reliable Building-Loan Association at their true value, while like treatment was denied to others, all to the detriment of the members of the said Reliable Building-Loan Association, and to his own personal gain.

(c) The officers of said Association failed to keep or cause to be kept the books of account and records of the Association correctly.

/s/ J. Aldrich Hall, Attorney for Federal Home
Loan Bank Administration.

Dated: May 29, 1946.

HOME LOAN BANK BOARD

No. 388, Date January 17, 1948

BE IT HEREBY RESOLVED that the Federal Home Loan Bank Administration Order No. 5254 appointing a Conservator for the Long Beach Federal Savings and Loan Association be and the same is hereby rescinded, such rescission to become effective upon the request of the shareholders of said Association through their authorized representative that the assets of said Association of any and every nature whatsoever belonging to or pertaining to said Association, together with all books, records and accounts of every nature pertaining to said Association be delivered to such shareholders upon demand made through their authorized representative.

BE IT FURTHER RESOLVED that the Conservator be and he is hereby authorized and directed to deliver all of the aforesaid assets, records and books of any and every nature to said shareholders through their authorized representative and to make a full and complete accounting to said shareholders for all assets and liabilities of any and every nature pertaining to said Association, and a copy of such accounting be filed with the District Court of the United States, in and for the Southern District of California.

BE IT FURTHER RESOLVED that the Conservator be, and he is hereby directed, to make available for inspection at the office of the Association all of the records and books of said Association to counsel for the Shareholder's Committee or an agent of the shareholders of said Association, or to a representative of the District Court of the United States, in and for the Southern District of California, Central Division.

BE IT FURTHER RESOLVED that a certified copy of this resolution be forthwith delivered to the above named Court and to counsel for each of the parties of record in actions numbered 5254 P. H. and 5678 (WM) PH in said Court, except counsel for Intervenor in said actions, and that a copy be furnished to the Conservator.

* * * * *

By the Home Loan Bank Board

J. FRANCIS MOORE,
Secretary.

HOME LOAN BANK BOARD

No. 2015, Date: September 9, 1949

WHEREAS it appears to the Home Loan Bank Board that:

1. The Long Beach Federal Savings and Loan Association, Long Beach, California, has failed to file the monthly and annual reports required by the Rules and Regulations for the Federal Savings and Loan System;

2. Said Association has failed and refused to furnish an affidavit of its president or secretary or other officer that, to the best of his knowledge and belief, the books of said Association correctly reflect the financial condition thereof, as required of all Federal savings and loan associations;

3. Said Association has failed to pay the premiums for insurance of its accounts and the installments thereon due and payable on or about June 5, 1948, December 5, 1948, and June 5, 1949, in the total amount of \$36,487.25, in violation and disregard of the statutes of the United States, the Rules and Regulations for Insurance of Accounts, and its contract with the Federal Savings and Loan Insurance Corporation;

4. Said Association and its officers have committed and are committing other violations of law and regulations, including violations set out in the More Definite Statement submitted to said Association on May 29, 1946, and have pursued and are pursuing a course that is jeopardizing and injurious to the interests of its members, creditors, and the public;

IT IS HEREBY ORDERED, pursuant to the authority vested by law in the Home Loan Bank Board and pursuant to the Rules and Regulations for the Federal Savings and Loan System, that the Long Beach Federal Savings and Loan Association, Long Beach, California, appear at a hearing, as hereinafter provided, and show cause, if any it have, why the Home Loan Bank Board should not, for the reasons hereinbefore stated, enter its order or orders for such action as it deems necessary or appropriate, including the appointment of the Federal Savings and Loan Insurance Corporation as receiver for said Association;

AND IT IS FURTHER ORDERED that said hearing be held before the Home Loan Bank Board or a member thereof or before a Hearing Officer of this Board, as shall be determined by the Board, and be convened at 10:00 o'clock A.M. on October 25, 1949, in Room 831, Federal Home Loan Bank Board Building, 101 Indiana Avenue, N. W., Washington, D. C. The Board or member thereof, or the Hearing Officer who presides at said hearing is hereinafter referred to as Presiding Officer;

AND IT IS FURTHER ORDERED that the Presiding Officer shall have complete charge of the hearing and shall have authority to: administer oaths or affirmations; receive, admit, allow, exclude and deny petitions, motions, and evidence; limit the time within which briefs and reply briefs may be filed and require the furnishing of copies thereof to other parties; make rulings and note objections; hear arguments; adjourn the hearing from time to time and from place to place; and do all such things and exercise all such powers as are necessary or proper to the orderly conduct of the hearing;

AND IT IS FURTHER ORDERED that any person, partnership, association, or corporation claiming to have an interest in the subject matter involved may, at any time before the closing of the hearing, file with the Presiding Officer a petition for leave to intervene at said hearing;

AND IT IS FURTHER ORDERED that the Long Beach Federal Savings and Loan Association, the Home Loan Bank Board, and any party whose petition for intervention has been allowed, shall have the right, by counsel or otherwise, to appear and be heard at the hearing, to produce, examine and cross-examine witnesses, to introduce documentary or other evidence, and to file briefs and reply briefs;

AND IT IS FURTHER ORDERED that if the Presiding Officer is a member of the Board or a Hearing Officer of the Board he shall, after the close of the hearing, make Proposed Findings of Fact which he shall file as promptly as possible with the Secretary to the Home Loan Bank Board together with (1) the complete transcript of testimony taken, and any exhibits, briefs or other material incorporated in the record of said hearing, and (2) the certificate of the Presiding Officer that he has mailed, by registered mail, a copy of the said Proposed Findings of Fact to the Long Beach Federal Savings and Loan Association, Long Beach, California;

AND IT IS FURTHER ORDERED that the Secretary or an Assistant Secretary to the Home Loan Bank Board, promptly upon the filing of said Proposed Findings of Fact and said transcript, advise all parties, by registered mail, return receipt requested, of the filing thereof, and make such Proposed Findings of Fact and such transcript available for inspection by any party at a price which will cover the reasonable cost of preparation, as determined by the Secretary;

AND IT IS FURTHER ORDERED that the Secretary to the Home Loan Bank Board shall receive for the consideration of the Home Loan Bank Board objections of parties to the said Proposed Findings of Fact, provided that said objections are received within forty-five days from the date on which the said Proposed Findings of Fact are filed by the Presiding Officer with the Secretary to the Home Loan Bank Board as hereinbefore provided;

AND IT IS FURTHER ORDERED that within a reasonable time after the expiration of the time for filing objections to the Proposed Findings of Facts or, if the hearing is held before the Board, within a reasonable time after the close of the hearing, the Board will make a final determination and enter its order or orders thereon;

AND IT IS FURTHER ORDERED that notice of said hearing be served by the Secretary to the Home Loan Bank Board by mailing a copy of this Order, by registered mail, to the Long Beach Federal Savings and Loan Association, 328 American Avenue, Long Beach, California, to Thomas A. Gregory, % Long Beach Federal Savings and Loan Association, 328 American Avenue, Long Beach, California, to J. E. Gregory, % Long Beach Federal Savings and Loan Association, 328 American Avenue, Long Beach, California, and to Ethel L. Roberts, % Long Beach Federal Savings and Loan Association, 328 American Avenue, Long Beach, California.

By the Home Loan Bank Board,
J. FRANCIS MOORE, Secretary.

No. 12511.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LA-
ROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, FEDERAL HOME LOAN BANK
OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN and
GEORGE K. BRAMLEY,

Appellants,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

**Brief of Appellees, Federal Home Loan Bank of Los
Angeles and Certain of Its Member Associations
and Appendix.**

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No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LA-
ROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, FEDERAL HOME LOAN BANK
OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN and
GEORGE K. BRAMLEY,

Appellants,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

Brief of Appellees, Federal Home Loan Bank of Los
Angeles and Certain of Its Member Associations.

This brief is written for and on behalf of appellees Federal Home Loan Bank of Los Angeles (hereinafter sometimes referred to as "Los Angeles Bank") and five of its member associations, namely, Coast Federal Savings & Loan Association, Standard Federal Savings & Loan Association, Central Building & Loan Association, State Savings & Loan Association and Los Angeles American Savings & Loan Association, the latter suing both in their own respective rights as member associations of the Los Angeles Bank and as virtual representatives of all other

member associations similarly situated other than Long Beach Federal Savings & Loan Association and First Federal Savings & Loan Association of Wilmington, which latter two associations are represented in these proceedings and in the consolidated actions below by separate counsel. The Los Angeles Bank is one of the plaintiffs in Action No. 5678-PH (the so-called Los Angeles action) below and is a cross-claimant¹ in the so-called Mallonee action (No. 5441-PH). The five member associations above mentioned are plaintiffs in the Los Angeles action.

Jurisdictional Statement.

Appellants' brief recognizes the fact that the jurisdiction of the District Court to hear and determine the consolidated actions below springs from two separate sources, since at the outset the Mallonee case and the Los Angeles case were each filed as independent actions.

In order to avoid duplication as regards points to be presented by other appellees, this brief will treat primarily of the jurisdiction of the District Court over the Los Angeles case, although of course several of the points presented will have equal application to the Mallonee action. This is particularly true as to what will be said herein with reference to the jurisdiction *in rem*² or *quasi-in rem* of the District Court over assets and properties in California under 28 U. S. C., Section 1655 (formerly Judicial

¹The allegations of the cross-claim of Los Angeles Bank in the Mallonee action are identical with those set forth in the first count of the complaint in the Los Angeles case. The second count of the complaint in the Los Angeles action sets forth the claims of the five member associations.

²Appellants agree (Brief p. 9) that *both* of the consolidated actions were designated as *in rem* actions.

Code, Sec. 57³, 28 U. S. C., Sec. 118), and with reference to the jurisdiction *in personam* of the District Court over defendants found in California (such as the so-called Federal Home Loan Bank of San Francisco, hereinafter called "San Francisco Bank," which is in actual possession of the assets and properties constituting the *res* below).

The complaint in the Los Angeles action accurately described its nature as being a "Complaint to enforce legal and equitable claims to, to obtain possession of and to remove liens from and clouds upon title to, property and for other and general relief." [20 R. 9455-6.]⁴ Jurisdiction was invoked under old Section 57 of the Judicial Code (then 28 U. S. C., Sec. 118, now 28 U. S. C., Sec. 1655) and under Sections 3, 12, 17, 25 and 26 of the Federal Home Loan Bank Act (July 22, 1932, 47 Stat. 725 *et seq.*, 12 U. S. C., Secs. 1421-1499); and the complaint alleged in terms that the activities complained of had operated to deprive these appellees of their property without due process of law, to cast a cloud upon their title and other interests as to such property, and that the claims of the defendants with reference thereto were wholly without right. [20 R. 9466, 9476, 9485, 9491-3.] It was also alleged that the matter in controversy exceeded, exclusive of interest and costs, the sum of \$45,000,000 as to the first (Los Angeles Bank) count and the sum of \$14,000,000 as to the second (the five member associations) count. [20 R. 9466, 9485-6.] The prayer was in the conventional form of an action *quasi-in rem* to remove a cloud on title, to quiet title and to regain possession. [20 R. 9493-96.]

³Judicial Code, Section 57 is set forth in the Appendix hereto.

⁴Denoting Vol. XX of the printed record, pages 9455 and 9456.

We shall of course, have occasion herein to discuss more fully the basis of the jurisdiction below. As to the jurisdiction here, the appeal is taken under 28 U. S. C., Section 1292 (1). The primary question here, so far as these appellees are concerned, relates not so much to the jurisdiction of this Court, *as to the scope of the review*. We say this for the reason that at page 109 of appellants' brief, we find the following candid statement:

“It is too clear for argument that the subject matter for hearing⁵ under the Board order of September 9, 1949, bears no relation to the subject matter of the Los Angeles action. The Board order relates only to the affairs of the Long Beach Association, while the Los Angeles action is concerned exclusively with the validity of the orders of March 29, 1946, consolidating the reserve banks of the former Eleventh and Twelfth Districts.”

These appellees agree without reservation that the board order and the injunctive order appealed from relate wholly to the affairs of the *Long Beach* Association; and we shall later press the point herein that any questions raised on this appeal, with reference to the basic jurisdiction of the District Court to hear and determine the *Los Angeles case*, are wholly irrelevant to the question actually presented on this appeal which is: Did or did not the District Court err, whether for want of power or otherwise, in granting an injunction which related only to the subject matter of the *Mallonee*, or *Long Beach*, case?

⁵This being, of course, the administrative hearing referred to in the injunction appealed from.

Statement of the Case.

The complaint in the Los Angeles case sets forth in substance the following facts:

On March 29, 1946, the Los Angeles Bank was the owner or, in the alternative, the lawful holder and entitled to the possession of over \$45,000,000 of value in assets and properties.⁶ [20 R. 9469.] It held some \$14,000,000 in value of securities pledged or deposited with it for safe-keeping by its member associations including the five appellee associations earlier mentioned herein. [20 R. 9485-6.] All of these assets and properties were in the State of California. [20 R. 9469.] It was being efficiently and economically operated and its affairs were in a healthy and prosperous condition. [20 R. 9476.]

2. On said date of March 29, 1946, defendant John H. Fahey, then acting as Federal Home Loan Bank Commissioner (since succeeded by appellant Home Loan Bank Board), without prior notice, hearing, or opportunity to be heard, arbitrarily and unlawfully seized the Los Angeles Bank and its assets, turned out its officers and purported to do each of the things specified in his purported orders Nos. 5082, 5083 and 5084 [20 R. 9470-74], which orders provided in substance as follows:

a. *Order No. 5082:* Los Angeles Bank was to be liquidated and reorganized; its assets and properties were “hereby” transferred to the Portland Bank; the liabilities of the Los Angeles Bank were to be assumed by and were “hereby declared to be” liabilities of the Portland Bank; the president of the Portland Bank was authorized to sign

⁶This fact is *affirmatively alleged* in the answer of the San Francisco Bank. [9 R. 4060.]

documents in behalf of Los Angeles Bank; the members of the Los Angeles Bank were to become members of the Portland Bank; the Portland Bank was to be moved to San Francisco and to be hereafter known as the San Francisco Bank; the Portland Bank officers, directors, etc., were to act as such for the San Francisco Bank for the calendar year 1946 and the Portland charter was to govern the San Francisco Bank until "changed"; the San Francisco Bank was to operate branches at Portland and Los Angeles; (then followed further provisions for replacement of officers and directors, etc.).

b. *Order No. 5083*: The District of the Portland Bank was readjusted to include Arizona, California, Nevada and Hawaii; the Portland Bank was moved to San Francisco and was henceforth to be known as the San Francisco Bank.

c. *Order No. 5084*: The Los Angeles Bank was dissolved.

3. Orders Nos. 5082, 5083 and 5084 were published in the Federal Register; as a result of such orders, which defendants assert to be valid, defendants claim Portland Bank to be the owner and entitled to the possession of the seized assets, which claim is wholly without right. [20 R. 9475-6.]

4. Said orders and the things done under them operated to deprive Los Angeles Bank of its property without due process of law, constituted a trespass and a fraud in law upon its constitutional rights, and cast a cloud upon its rights, titles and interests as to the assets and properties in question. [20 R. 9476.]

[The complaint then went on to charge in detail that the Commissioner's purported determination as to the necessity of seizing the Los Angeles Bank was untrue, sham and false and that in reality the seizure was the punitive culmination of a series of acts whereby the Commissioner had arbitrarily attempted to dominate the affairs of the Los Angeles Bank and to dictate to it as to who should fill an existing vacancy in its presidency: 24 R. 9480-85.]

Since the case has not been tried, the scope of the controversy must be measured by the claims set forth in the complaint. In this connection, it is worthy of note to point out that the answer of the San Francisco Bank admits that it claims the disputed assets solely under and by virtue of the three administrative orders above referred to; in other words, the sole muniments of title upon which it relies in this action *quasi-in rem* to quiet title, to remove clouds on title and to regain possession, are these three administrative orders. [9 R. 4058, 4060-61, 4062-63, 4064-65, 4066, 4071, 4078-79, 4088.]

On the merits then, the fundamental question below concerns the basic power of a court in equity, in an action *quasi-in rem*, to adjudicate property rights as against a claim that the administrative nature of the acts underlying the controversy preclude the exercise of its historical jurisdiction in this regard. And it should also be borne in mind that in this action *quasi-in rem* the District Court also has jurisdiction *in personam* over the party actually in possession of the *res*; namely, the San Francisco Bank which, as we have seen, openly concedes that at all times down to March 29, 1946, the Los Angeles Bank was either the owner or in any event entitled to the possession of the properties and assets in dispute. This means, as we shall later point out, that any decree which might be rendered

directing a return of these properties and assets would be directly operative—*would expend itself completely*, as the cases say—upon the San Francisco Bank without requiring any action whatever by the Home Loan Bank Board.

Questions Involved.

In addition to the questions posed by appellants at pages 21 and 22 of their brief, these appellees suggest the following:

1. Since it is conceded that the subject matter of the enjoined administrative hearing bears no relation to the subject matter of the Los Angeles action, does it not necessarily follow that any questions with reference to the jurisdiction of the District Court over that action are moot and irrelevant insofar as this appeal is concerned?

2. In view of such concession, does it not follow that in presenting the questions as to the jurisdiction of the District Court over the Los Angeles action, appellants are in reality asking this Court to render a purely advisory opinion as to a matter irrelevant to the subject matter of the present appeal and hence unnecessary to any decision to be rendered on the present appeal?

Summary of the Argument.

1. The contentions of appellants with reference to asserted lack of jurisdiction over the subject matter of the Los Angeles action present questions which are wholly moot and irrelevant to the merits of the present appeal and hence are not necessary to any decision which may be rendered herein.

2. The Los Angeles action is neither an action to enforce the charter of the Los Angeles Bank nor is it an action brought to review the actions of the commissioner evidenced by his Orders Nos. 5082, 5083 and 5084. It is, on the contrary, a plenary equity action *in rem* or *quasi-in rem* brought under former Judicial Code Section 57, in which the effect of the orders above referred to is drawn in question purely as an incident to the District Court's inquiry into title, ownership and the right to possession of the assets and properties constituting the *res* before the Court. In addition to this, and as an incident to its basic jurisdiction *in rem*, the Court has acquired jurisdiction *in personam* of the San Francisco Bank, the party in actual possession of the assets and properties in dispute.

3. The activities of the commissioner leading up to the seizure of the demanded assets and properties are subject to judicial scrutiny.

4. The contention of appellants that neither the Los Angeles Bank nor its member associations have any standing to question the validity of the orders of March 29, 1946, is devoid of merit.

5. The contention of appellants that the Home Loan Bank Board and its members are indispensable parties is devoid of merit.

6. The orders of March 29, 1946, are not valid on their face, nor are they immune from attack by a showing, *dehors* the orders themselves, that the seizure was unlawful, arbitrary and punitive in its nature.

7. The injunctive order appealed from was a proper exercise of the Court's equity powers in protecting its jurisdiction.

ARGUMENT.

I.

The Contentions of Appellants With Reference to Asserted Lack of Jurisdiction Over the Subject Matter of the Los Angeles Action Present Questions Which Are Wholly Moot and Irrelevant to the Merits of the Present Appeal and Hence Are Not Necessary to Any Decision Which May Be Rendered Herein.

This appeal has been taken solely from the order of the District Court enjoining the holding of an administrative hearing, in Washington, as to the affairs of Long Beach Federal Savings & Loan Association. The question on the merits is whether the District Court was right or wrong in granting the injunctive order appealed from. As we have seen, at page 109 of their brief, appellants openly state that “It is too clear for argument that *the subject matter for hearing under the Board order of September 9, 1949, bears no relation to the subject matter of the Los Angeles action. The Board order relates only to the affairs of the Long Beach Association, while the Los Angeles action is concerned exclusively with the validity of the orders of March 29, 1946⁷ . . .*”

It is therefore manifest that the order appealed from presents *no question whatever concerning the jurisdiction of the District Court over the action brought by the Federal Home Loan Bank of Los Angeles and its member*

⁷Emphasis here, as elsewhere, is supplied unless otherwise noted.

stockholders to regain possession of the property and assets summarily seized from them. Therefore, under familiar rules of appellate practice, the question of the jurisdiction (or any asserted lack thereof) of the District Court over the *Los Angeles* action is wholly unnecessary to any decision which may be rendered on this appeal.

Reflection will show that this must be so. Whether the District Court does or does not have jurisdiction to hear and determine the claims of the Los Angeles Bank to a return of its seized assets is obviously and utterly irrelevant to the question of the power (or asserted lack thereof) of the District Court to enjoin the holding of a proposed administrative hearing which “*relates only to the affairs of the Long Beach Association*”; which latter question is the one to be decided upon this appeal. Jurisdiction or the lack thereof over the affairs of the Los Angeles Bank, in other words, should neither add to nor detract from the judicial power to grant an injunction in aid of the District Court’s jurisdiction (springing from the *Mallonee* case) over the affairs of the Long Beach Association. Nor does the fact of consolidation of the two actions in any way alter this result; for the jurisdiction of the consolidated actions, as appellants’ brief recognizes throughout, is but the sum of the respective jurisdictions, separately invoked, of the two independently filed actions.

The result is that in asking this Court to pass upon the question of jurisdiction over the Los Angeles action, appellants are necessarily requesting this Court to render an advisory opinion upon a question not only unnecessary to,

but wholly irrelevant, both in fact and on appellants' own theory, to the question actually presented for decision: *Whether the District Court was right or wrong in granting an injunction relating wholly to the affairs of the Long Beach Association*. Federal appellate courts do not write advisory opinions, *Muskrat v. U. S.*, 219 U. S. 346, 351 *et seq.*; *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 461, nor do they pass upon questions which are not necessary to the decision of the questions actually involved. *Gibbes v. Zimmerman*, 290 U. S. 326, 333; *Lewis Publishing Co. v. Wyman*, 228 U. S. 610, 615; *Glasgow v. Baker*, 128 U. S. 560, 577-8; *Thompson v. Terminal Shares*, 8 Cir., 89 F. 2d 657.

For these reasons it is respectfully suggested that a consideration of each and all of the points presented under appellants' Point II, covering pages 88-106 of their brief and all dealing with the Los Angeles Bank seizure of March 29, 1946, is unnecessary to the decision herein. At the same time, we desire to make it abundantly clear that we are by no means reluctant to meet appellants on their own ground so far as the jurisdiction underlying the Los Angeles Bank litigation is concerned; and we therefore turn now to a consideration of that question, whether it be germane or not to the present appeal.

II.

The Los Angeles Action Is Neither an Action to Enforce the Charter of the Los Angeles Bank nor Is It an Action Brought to Review the Actions of the Commissioner Evidenced by His Orders Nos. 5082, 5083 and 5084. It Is, on the Contrary, a Plenary Equity Action in Rem or Quasi-in Rem Brought Under Former Judicial Code, Section 57, in Which the Effect of the Orders Above Referred to Is Drawn in Question Purely as an Incident to the District Court's Inquiry Into Title, Ownership and the Right to Possession of the Assets and Properties Constituting the Res Before the Court. In Addition to This, and as an Incident to Its Basic Jurisdiction in Rem, the Court has Acquired Jurisdiction in Personam of the San Francisco Bank, the Party in Actual Possession of the Assets and Properties in Dispute.

Appellants' twin theses: that the Los Angeles action is an action to enforce the charter of that institution and that it is brought to "review" the Commissioner's actions culminating in the seizure of the Los Angeles Bank's assets pursuant to Orders Nos. 5082, 5083 and 5084, exhibit nothing more than a studious attempt to misunderstand the true nature of the action.

A reading of the complaint makes it perfectly obvious that all of the elements of the conventional cause of action in equity by an owner out of possession to quiet title, to remove a cloud on title and to regain possession are present. Ownership and right to possession in the Los Angeles Bank down to March 29, 1946, deprivation of possession as of that date, an adverse claim under color of title (evidenced by the three orders as published in the Federal Register), plus the customary allegation that such claim is wholly without right, are all set forth.

So viewed, and correctly viewed, the Los Angeles complaint is open to neither of the interpretations which appellants seek to put upon it. The action is purely and simply an equitable action *quasi-in rem* to try title as between one who alleges itself to be an owner out of possession—the Los Angeles Bank—and one who alleges itself to be an owner in possession—the San Francisco Bank. The latter claims, as its sole muniment of title, the three administrative orders of March 29, 1946, and particularly Order No. 5082, the purported instrument of transfer. The question presented, therefore, is whether or not the orders in question did or did not operate to pass title to the disputed assets and properties; a question which is present, generally as regards a deed or other instrument under which the defendant claims, in any quiet title suit or action to remove a cloud on title.

This is certainly a question which the District Court has jurisdiction to determine, whether its ultimate decision be right or wrong. And the decision of this question calls for no species of *review* of the administrative orders, in the sense in which appellants use the term. The question is, not whether the orders should be set aside, in the administrative sense, but whether they, and particularly Order No. 5082, operated to transfer title to the San Francisco Bank. It is the contention of the latter that the orders did have this effect. It is the contention of the Los Angeles Bank that they did not; that from the standpoint of legal title the orders had no more effect than would a wild deed, executed in favor of the San Francisco Bank by a third party (here the Commissioner) not connected with the title. These are questions for the District Court to determine, along with the other questions which appellants raise on this appeal, and none of which go to the *jurisdiction* of the District Court. *All* of these

questions go to the merits of the key question below, which is: Did or did not the orders in question pass title to the demanded assets and properties? And it is certainly a novel experience to the writers of this brief that an appellate court should be asked to decide this question in advance of a trial on the merits.

Appellants seem to lay stress upon the fact that the prayer in the Los Angeles complaint asks that the orders in question be declared to be null and void and that any clouds or liens created thereby be removed. This is no more than would be prayed as to any wild deed or other instrument clouding or otherwise affecting a valid title. It certainly does not call for a setting aside of the orders as in the case of an administrative review.

However, and in any event, and without expressing any further opinion upon the subject, if it should appear that such relief as prayed goes too far, it is nevertheless obvious that this particular objection relates merely to the form of the decree to be rendered. The District Court, having jurisdiction *in personam* over the San Francisco Bank, has plenary power to adjudicate the San Francisco Bank a constructive trustee and order it to return the demanded assets and properties without in any way touching the orders in question. Such action would clearly be within the powers of a court of equity, in a proceeding *quas-in rem*. (*Title Insurance and Trust Co. v. California Development Co.*, 171 Cal. 173, 198-199.) Such relief *in personam* would be purely in aid of and incidental to the exercise of the court's jurisdiction *in rem* over the assets and properties themselves.

Jellenik v. Huron Copper Mining Co., 177 U. S. 1;
Harvey v. Harvey (7 Cir.), 290 Fed. 653.

The true nature of the incidental powers of the court in an action of this type is excellently set forth in *Harvey v. Harvey, supra*, where the court said:

“Appellant’s contention that the injunction granted relief *in personam* and therefore cannot be based upon service under Section 57, which applies to actions *in rem*, is not well founded. This suit is in the nature of a suit to quiet title to personal property within jurisdiction of the court. The court has in its custody the *res*. It puts out its protecting hand and says to the defendants that the plaintiff claims the *res*; that pending the determination of that claim the *statu quo* shall be maintained and the defendants restrained from using the *res*; that if they desire to contest the claim of the plaintiff to this property they shall come into court and do so. Incidental to its jurisdiction over the *res*, the court may use its power of injunction not to prevent distinctly personal acts by the defendants disconnected with the *res*, but to prevent the defendants interfering with, disposing of, converting, injuring, or wrongfully using the *res*.” (290 Fed. at p. 659.)

Therefore, the orders of March 29, 1946, are involved in the Los Angeles Action only as an incident to a determination, by a court of equity having jurisdiction over a specific *res*, of title and right to possession of that *res*. Since both of appellants’ premises as to the nature of the action are false, it therefore follows that their conclusions in this regard are also false. At the same time, we cannot permit appellants’ assertions as to their judicial untouchability to pass unchallenged.

III.

The Activities of the Commissioner Leading Up to the Seizure of the Demanded Assets and Properties Are Subject to Judicial Scrutiny.

Section 26 of the Federal Home Loan Bank Act, as amended, 12 U. S. C., Sec. 1446, under which the Commissioner purported to act in seizing the demanded assets, confers a power and prescribes a procedure for the liquidation or reorganization of a federal home loan bank. Among other things, the Commissioner (the Commissioner succeeded to the powers of the Federal Home Loan Bank Board under Executive Order No. 9070) must make a finding; and he must also pay off and retire the outstanding stock of the bank, in whole or in part. Appellants argue that as a matter of statutory construction, the court should imply from the Act that the Commissioner was given final and absolute discretion in dissolving and reorganizing a bank, without any right of judicial review whatever. Granting the power to liquidate or reorganize, the procedure therefor is set forth in the statute and must be followed. (*Ohio Bell Telephone Co. v. Public Utilities Comm*, 301 U. S. 292, 304.) This process expressly included paying off and retiring the stock of the bank in whole or in part. This process, the Los Angeles complaint alleges (and we do not understand the fact to be disputed), was not followed here. And it is as true of the Commissioner as of any other administrative agency that where, as here, a particular mode of exercising a power is conferred by law, *the mode is the measure of the power*. (*Reams v. Cooley*, 171 Cal. 150; *Cowell Lime & Cement Co. v. Williams*, 182 Cal. 691.) The question of whether the Commissioner did or did not exercise his power in the mode prescribed is of course

a *judicial* question; which of course means a question reviewable by a *court*.

Section 26 also requires a *finding* of efficiency and economy in the accomplishment of the purposes of the Act. The Commissioner here made no *finding* whatever. He did make a purported *determination* that the efficient and economical accomplishment of the purposes of the Act would be aided by his contemplated action. (Order No. 5082.) It is obvious that a *finding*, as required by the statute, imports a hearing, based upon evidence, before any “determination” or other decision may be arrived at. A “finding” of the existence of certain facts presupposes some hearing of evidence tending to prove such facts.

Abrahms v. Daugherty, 60 Cal. App. 297, 302;

California Employment Comm’r v. Malm, 59 Cal. App. 2d 322, 324;

Mt. Carmel Public Utility & Service Co. v. Public Utilities Comm’r (Ill.), 130 N. E. 693, 696.

The fact that the Commissioner purported to make a “determination” rather than the finding which the statute prescribes is in itself persuasive evidence that he was unable to find, *from evidence*, any *facts* which would have supported his determination; and, of course, it is not open to dispute that the Commissioner acted without affording the Los Angeles Bank or its members any notice or hearing whatever. But again, the question of whether the Commissioner did or did not make a finding and, if so, whether such finding was supported by evidence, are *judicial* questions, as is the further question, tendered by the Los Angeles complaint, that the Portland Bank did

not *acquire* the assets of the Los Angeles Bank, with the approval of the Board, as the Act provides, but that instead the Los Angeles assets were thrust upon the Portland Bank by the Commissioner without any affirmative corporate action whatever by either bank.

Furthermore, under general principles of jurisprudence the right of appeal to the courts in the case of administrative action of an arbitrary or capricious nature which, as here, directly affects property rights is established. (*Markall v. Bowles*, 58 Fed. Supp. 463 (D. C., N. D., Cal.).) Under such circumstances Federal courts will read the requirements of due process into the Act, and due process means a hearing; therefore, a hearing is an integral part of the Federal Home Loan Bank Act, just as much as if the Act itself in words stated that a hearing should be held. (*Cf. Eisler v. Clark*, 77 Fed. Supp. 610 (D. C., D. C.), *cert. denied*, 338 U. S. 879.) In many cases it has been held that where discretion is conferred on an administrative officer to render a decision, this decision must be honestly rendered, and if it is arbitrary or capricious, or rendered in bad faith, the courts have power to review it and set it aside.

Gadsden v. United States, 78 Fed. Supp. 126 (Ct. Claims).

See further:

Southern Railway Co. v. Virginia, 290 U. S. 190,
194 *et seq.*;

Londoner v. Denver, 210 U. S. 373, 386;

Standard Airlines v. Civil Aeronautics Board, 177
F. 2d 18, 20 (D. C. Cir.);

Stark v. Brannan, 82 Fed. Supp. 614, 617 (D. C.,
D. C.).

The test seems to be this: That if an administrative agency merely *advises*, a hearing in the due process sense may not necessarily be required; but where, as here, the agency *ordains*, in such a manner as to impinge upon property rights, a due process (which means a *full and fair*) hearing is required at the administrative level in order to facilitate attendant judicial review.

Norwegian Nitrogen Products Co. v. U. S., 288
U. S. 294, 318-319;

Morgan v. U. S., 304 U. S. 1;

I. C. C. v. L. & N. R. Co., 227 U. S. 88;

Ohio Bell Telephone Co. v. Public Utilities Com.,
301 U. S. 292.

There can certainly be no question here but that the Commissioner *ordained* here. He ordained that \$45,000,-000 of assets lawfully owned or possessed by the Los Angeles Bank should, by mere official *fiat*, be transferred to the Portland Bank. That his ordainment impinged upon the property rights of both the Los Angeles Bank and its depositor or pledgor members is self-evident. Under these circumstances, appellants' argument, that neither the bank nor its members' property rights were affected by the seizure, wholly fails to stand scrutiny.

The basic principle is that due process requirements are satisfied *if, and only if, at any time before governmental action with reference to property rights becomes final, hearings are allowed either by administrative or by judicial action.* Davis, "The Requirement of Opportunity to be Heard in the Administrative Process," 51 Yale Law Journal 1093, 1136 (1942). It is conceded that the Los Angeles Bank received no hearing at the administrative level. It is therefore entitled to it *now*, when the matter is pending before a *court*. Otherwise, it is respectfully submitted, the plain mandate of the Fifth Amendment will have been violated. This means that the District Court is empowered, as a matter of due process of law, to scrutinize the activities of the Commissioner here complained of, in addition to its plenary jurisdiction in equity to adjudicate title and the right to possession to the assets and properties over which it has acquired jurisdiction.

What has been said above should dispose of the contention that the findings (if any) of the Commissioner are not subject to judicial review. Such a plea in the face of the charge of arbitrary action directly affecting the property rights of the plaintiffs in the Los Angeles action simply cannot be justified. And this is particularly true where, as in the pattern of the Federal Home Loan Bank Act, no administrative review is provided. This merely means, in the eyes of equity, that no adequate remedy at law has been provided for the protection of the property rights of those plaintiffs against arbitrary action; in itself, a valid ground of equity jurisdiction.

IV.

The Contention of Appellants That Neither the Los Angeles Bank nor Its Member Associations Have Any Standing to Question the Validity of the Orders of March 29, 1946, Is Devoid of Merit.

The contention of appellants in this regard seems to be predicated upon the theory, already commented upon herein, that the seizure of March 29, 1946, affected neither the property rights of these appellees nor their rights to be protected against tortious invasion. In the light of the allegations of the Los Angeles complaint, to state appellants' contention is to answer it. As we have seen, the complaint directly charges a tortious invasion of the property rights both of the Los Angeles Bank (rights of a value of \$45,000,000), and of its member associations (rights valued at \$14,000,000). Whether there was such an invasion and whether the same was tortious, were and are questions for the District Court to determine in the exercise of its jurisdiction to try title to the demanded assets. The charge was and is *conversion* as to personal property and *trespass* as to realty; it is respectfully urged that an assertedly sacrosanct administrative agent has no more right to commit torts of this nature, under color of official rectitude, than any other person.

The plain fact is that irrespective of how or for what reason the Los Angeles Bank was created, as soon as it acquired *property* in the course of its operations, it could only be deprived of that property through procedures which satisfy the requirements of due process of law. Compare *In re Carter*, D. C., Cir., 177 F. 2d 75, 77-8.

As for the purported “dissolution” of the Los Angeles Bank, this is, of course, but part and parcel of the arbitrary attempt to denude it of its properties. Even the orders of March 29, 1946, recognize that before a Federal Home Loan Bank may be “dissolved,” some attempt must be made (a) to dispose of its assets, and (b) to take care of its stockholders. Here the charge is that *neither* of these conditions precedent were lawfully carried out. The entire procedure embodied in the three orders is, therefore, subject to judicial scrutiny in the Los Angeles action in the course of trying title to the seized assets.

It is subject to examination in two aspects: (1) in the right of the Los Angeles Bank itself, and (2) in the right of appellee member associations.

And it is not to be overlooked that it is the latter to whom, even in the impossible event of a valid dissolution without a proper disposition of the Bank’s assets, would descend the right of recovering those assets or, in the alternative, protecting them from spoliation. Appellants could not, therefore, avoid a judicial review of the activities of March 29, 1946, on any specious plea that the Los Angeles Bank no longer exists as a corporate entity; a plea which, to the credit of appellants, they do not stress, and which, if they did stress it, would merely point up the fact that in any event the District Court has jurisdiction to try title to the seized assets at suit of the member associations.

V.

The Contention of Appellants That the Home Loan Bank Board and Its Members Are Indispensable Parties Is Devoid of Merit.

Here again we find appellants ignoring the true nature of the Los Angeles action. It is Hornbook law that where a court has jurisdiction *in rem* or *quasi-in rem*, the principal function of the process of the court is to apprise parties having or claiming an interest in the *res* of the controversy in reference thereto, in order that they may appear, *if they so desire*, and protect their interests. And, under the pattern of old Judicial Code, Section 57 (28 U. S. C., Sec. 1655), absent defendants may be served by substituted process, which was here done in the case of Commissioner Fahey. Upon service thus being made, Commissioner Fahey had the right to appear or not, as he chose. He appeared by various motions, attacking jurisdiction both of the subject matter and over his person. His successor, the Home Loan Bank Board, has heretofore answered as to the merits while at the same time attempting to preserve the jurisdictional points.

For the purposes of jurisdiction of the District Court over the Los Angeles case, it is manifestly of no moment whether Fahey or the Board actually appeared or not. 28 U. S. C., Section 1655 provides (as did Judicial Code, Section 57 before it) that where the absent defendant does not, after substituted service, appear, the adjudication shall, as to him, "affect only the property which is the subject of the action."

It is only such a decree—one affecting only the property which is the subject of the action—which is sought in the Los Angeles action. The prayer is that the assets

and properties be recovered, that title in appellees be quieted and confirmed, and that any cloud occasioned by the three orders be removed.

In other words, so far as Commissioner Fahey and his present successor are concerned, the jurisdiction of the District Court to adjudicate title and right to possession of the demanded properties and assets attached at the moment service was made upon the late Commissioner. *Whether he was an indispensable party to this controversy or whether he was not, the District Court obtained jurisdiction then and there to adjudicate his claims, if any, with reference to the assets.*

Repeated decisions of the Supreme Court indicate, however, that neither Fahey nor the Home Loan Bank Board were or are indispensable parties to this controversy over title and right to possession of the seized Los Angeles Bank assets. The test, as laid down by the Supreme Court is whether or not the decree may be said to be capable of expending itself against the subordinate of the governmental agency involved; here, of course, the San Francisco Bank.

In *Williams v. Fanning*, 332 U. S. 490, the court held that the Postmaster General was not an indispensable party in an action brought to enjoin the local Postmaster from carrying out a postal fraud order issued by the Postmaster General after a hearing. The court cited authority for the proposition that a superior officer is an indispensable party if the decree granting the relief sought would require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him. It was held that the Postmaster General was not indispensable because the decree entered would

effectively grant the relief desired by *expending itself on the subordinate official* who was before the court.

“The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutger* case. No concurrence on his part is necessary to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command.” (P. 494.)

Similarly, in the present case, the decree will effectively grant the relief desired by expending itself on the San Francisco Bank, which is before the court and is in actual possession of the disputed assets. All that the court is asked to command is the reconveyance of the property and assets wrongfully and arbitrarily seized from the plaintiffs, accounting with reference to said assets and properties, and the quieting of title to the assets and properties in the plaintiffs. None of this requires concurrence on the part of the Federal Home Loan Bank Board or any other non-resident defendant. The decree in order to be effective need not require the Board to do a single thing, either directly or indirectly.

Further illustrating that the Federal Home Loan Bank Board is not an indispensable party to this action are the following: *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 96 (Secretary of the Interior not an indispensable party to a suit to enjoin the exclusion of commercial fishermen from shore line waters designated as an Indian Reservation by the Secretary, on the ground of the invalidity of the Secretary's order and regulation); *Jeager v. Simrany*, 9 Cir., 180 F. 2d 650, 651 (Commissioner of Immigra-

tion not an indispensable party to a suit for declaratory judgment and injunction against a local immigration officer, to prevent him from proceeding to cancel the record of registry and a certificate of lawful entry of an alien); *Rank v. Krug* (D. C. S. D., Cal.), 90 Fed. Supp. 773, 802 (Secretary of the Interior and the United States not indispensable parties to a class suit to enjoin interference with plaintiff's water rights by reason of erection of dam under Federal Reclamation Laws); *Reeber v. Rossell* (D. C. N. Y.), 91 Fed. Supp. 108, 111 (Administrator of Veterans Affairs and Chairman of Civil Service Commission not indispensable parties in an action for declaratory judgment that the Administrator's order was null and void as against the plaintiffs); *National Radio School v. Marlin* (D. C., Ohio), 83 Fed. Supp. 169, 170 (Administrator of Veterans Affairs not indispensable party to suit to enjoin local veterans' finance officer and others from withholding issuance of vouchers for veterans' tuition). The Court of Appeals for the Sixth Circuit expressed the guiding principles in *Varney v. Warehime*, 147 F. 2d 238, as follows:

“Matters of convenience and necessity are entitled to consideration. Citizens should not be compelled to seek a distant forum for litigation of their controversies with the Government, and likewise, public officials should not be compelled to neglect their duties to answer charges of usurpation of power in a distant forum.

“Approaching the subject from a practicable standpoint, we need not overlook the fact that the question of constitutionality or statutory power of a pub-

lic official is usually a question of law, and may be determined in any appropriate forum without the personal presence of the superior government official.

“The right of intervention is available to a superior official in any suit where his subordinate is made a party defendant. Governmental regulations under present circumstances are so widespread and affect such a vast number of our people that those who in good faith believe a public official is proceeding beyond his jurisdiction should be permitted to litigate the question if the officer before the court is such an agent in the matter involved that it is reasonable to proceed to an adjudication of the issue with finality.”

It therefore follows that neither Fahey nor the Federal Home Loan Bank Board were or are indispensable parties to this action; but in any event, as we have pointed out, the jurisdiction of the District Court to adjudicate title and the right to possession of these assets under Section 57 of the Judicial Code, as far as Fahey or the Board were or are concerned, attached immediately when substituted service on Fahey was completed, whether he was an indispensable party or not. Compare *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1; *Harvey v. Harvey*, 7 Cir., 290 Fed. 653; *McRoberts v. Independent Coal & Coke Co.*, 8 Cir., 15 F. 2d 157.

What we have said above also answers appellants' kindred contention that the Los Angeles suit is an action against the United States. It is no more such than was *Williams v. Fanning* or the other cases cited above to show that neither Fahey nor the Board were or are indispensable parties.

VI.

The Orders of March 29, 1946, Are Not Valid on Their Face, nor Are They Immune From Attack by a Showing, Dehors the Orders Themselves, That the Seizure Was Unlawful, Arbitrary and Punitive in Its Nature.

It is claimed by appellants that the orders of March 29, 1946, were valid on their face. With all due respect, the exact converse is true.

It is to be borne in mind that it is conceded that as of March 29, 1946, the Los Angeles Bank was the undoubted owner or depositary or pledgee (and in all events entitled to the possession) of some \$45,000,000 in assets. It should also be borne in mind that under Section 12 of the Federal Home Loan Bank Act a federal home loan bank is a body corporate with power to make contracts and hold and dispose of property. *Its powers are to be exercised and enjoyed subject to the approval of the Board.*

With this background in mind, let us see just how these orders stand scrutiny, especially when viewed in the light of the charges set forth in the Los Angeles complaint. We have already commented upon the failure of the Commissioner to make the *finding* prerequisite to a valid liquidation or reorganization pursuant to Section 26 of the Act (12 U. S. C., Sec. 1446).

Section 26 (1446) reads as follows:

“§1446. LIQUIDATION OR REORGANIZATION; ACQUISITION OF ASSETS BY OTHER BANKS; ASSUMPTION OF LIABILITIES.

“Whenever the board finds that the efficient and economical accomplishment of the purposes of this

chapter will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part." July 22, 1932, c. 522, §26, 47 Stat. 740.

(1) "*May be liquidated or reorganized.*"

The use of the disjunctive "or" in this clause of Section 26 will be noted.

As against this power to liquidate *or* reorganize, the Commissioner, by simultaneous action evidenced by Orders Nos. 5082, 5083 and 5084, purported to (a) liquidate *and* (b) reorganize *and* (c) dissolve the Los Angeles Bank *and* (d) transfer all of its assets, wholly without consideration, to the Portland-San Francisco Bank; and all of this without any action whatever by the directors or shareholders of either the Los Angeles or the Portland Bank. [20 R. 9478-9.]

These activities were wholly without legal justification or excuse.

In the first place, this was not a liquidation. There was no pretense of paying off such creditors as the bank may have had or of winding up its affairs. [20 R. 9477-8.] A mere transfer of assets, with or without consideration, is not a liquidation.

Buck v. Kleiber Motor Co. (9 Cir.), 98 F. 2d 903.

In the second place, the transaction was not a reorganization. The Los Angeles Bank was not reorganized, for the aim of the three orders was only to encompass its complete destruction. And again, a mere transfer of assets, with or without a consideration, is not a “reorganization,” any more than it is a “liquidation.” Obviously it is either a sale (if there be a consideration) or, as was the case here, a *gift* (made in this case by one having no power of disposition).

Compare:

LeTulle v. Schofield, 308 U. S. 415;

Commissioner v. Kitselman (7 Cir.), 89 F. 2d 458, 460;

United Light & Power Co. v. Commissioner (7 Cir.), 105 F. 2d 866, 877;

National Surety Co. v. Sand Springs State Bank (Okla.), 177 Pac. 574, 576.

In the third place, as we have indicated above, the Commissioner had no power of disposition over the assets of

the Los Angeles Bank, either by way of sale, gift or otherwise, to the exclusion of corporate action by the bank itself.

Under Section 12 of the Act (12 U. S. C., Sec. 1432),⁸ as we have seen, full corporate powers are vested in the home loan banks, subject only to the *approval* of the Commissioner (Board) in specified particulars not here material. *It was thus the bank, as a corporation, and not the Commissioner, which had the power to hold or dispose of its property.*

The necessary conclusion is that the Commissioner did not “liquidate,” nor did he “recognize.” What he did was to give away, to another corporate entity, assets over which he had no power of disposition; and this he could not lawfully do either under Section 26 or any other provision of the Act.

(2) *“And its stock paid off and retired in whole or in part in connection therewith.”*

It is undisputed that none of the stock of the Los Angeles Bank was either paid off or retired. In lieu of this, Order No. 5082 attempted by *fiat* and without the knowledge or consent of any of the Los Angeles Bank stockholders to make the latter shareholders of the Portland-San Francisco Bank. Such action was wholly without warrant or authority in law besides amounting to a clear violation of the intent and purpose of Section 26.

⁸Section 12 (1432) is set forth in the appendix hereto.

(3) *“After paying or making provision for the payment of its liabilities.”*

The liabilities of the Los Angeles Bank were not paid off nor was any valid provision made for their payment. Order No. 5082 purported to provide that the liabilities and obligations of the Los Angeles Bank “are to be” assumed by the Portland Bank; and the same “are hereby declared to be and become the liabilities and obligations of” the Portland Bank. The attempt of the Commissioner thus to force such liabilities and obligations on the Portland Bank was a clear encroachment upon the powers of that institution to enter into contracts as provided in Section 12 of the Act; all of which was to the prejudice of the creditors and members of the Los Angeles Bank.

(4) *“Any other Federal Home Loan Bank may with the approval of the board acquire assets of any such liquidated or reorganized bank.”*

Here, again, it is undisputed that the Portland Bank did not “acquire”; the assets were forced upon it without any affirmative action being taken by its own management. For the same reason, the Commissioner did not “approve”; he was the actor in derogation of the powers of the Portland Bank under Section 12.

(5) *“And assume liabilities thereof in whole or in part.”*

Portland Bank assumed nothing; the liabilities, like the assets, were purportedly forced upon it in derogation of its own corporate powers. An assumption of liabilities, of course, envisages a voluntary contractual arrangement for the benefit of creditors or others having an interest in the assets transferred. Here there was no contract

whatever; and any creditor of the Los Angeles Bank prior to seizure would have been powerless to enforce his demands had the Portland Bank chosen to resist them.

In addition to the foregoing, the attempt to dissolve the Los Angeles Bank even aside from the other effects of the orders, necessarily operated as a deprivation of the property of the Los Angeles Bank and its member associations without due process of law.

Section 25 of the Act (12 U. S. C., Sec. 1445) provides that each Federal Home Loan Bank shall have succession until dissolved by the Board (Commissioner) "under this Chapter" or by further Act of Congress. Reference to Section 12 reveals that a dissolution operates to deprive the dissolved bank of the powers, among others, to make contracts and to own, hold and dispose of property. In this case, it is admitted by the Portland Bank that at the time of the seizure Los Angeles Bank owned in its own right or was entitled to the possession of assets and properties owned by its member-shareholders of a total value in excess of \$45,000,000. The effect of the "dissolution" was by administrative ukase and without notice, hearing or opportunity to be heard, to strip the Los Angeles Bank of all of these assets and place them in the possession of the Portland Bank. In the case of the member-shareholders of the Los Angeles Bank the effect was to strip them of their membership and shareholder status in the Los Angeles Bank, to thrust upon them, without their consent, membership in the Portland-San Francisco Bank and turn over their assets in the possession of the Los Angeles Bank either as collateral or on deposit to the

Portland-San Francisco Bank. Such activities constituted a clear deprivation of property without due process of law both as to the Los Angeles Bank and its members.

Compare:

Scott v. Donohue, 93 Cal. App. 126, 129-130;

Knights, etc., Inc. v. Francis, 79 Cal. App. 383, 385-386.

“The historic phrase ‘a government of laws and not of men’ epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. ‘A government of laws and not of men’ was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power.” (Mr. Justice Frankfurter, concurring in *United States v. United Mine Workers*, 330 U. S. 258, 307-8.)

In addition to the foregoing shortcomings of the orders on their face, the complaint in the Los Angeles case, as we have seen, alleges facts which, if true, would establish that the seizure of March 29, 1946, was unlawful, arbitrary and punitive and would hence overcome the disputable presumption of official rectitude upon which appellants seem to rely in this regard.

VII.

The Injunctive Order Appealed From Was a Proper Exercise of the Court's Equity Powers in Protecting Its Jurisdiction.

The distinction between general and special appearances has disappeared from the federal practice. See

E. G. Bowles v. Underwood Corp., 5 F. R. D. 25;
Blank v. Bitker, 7 Cir., 135 F. 2d 962, 966.

Although defendant Fahey and the Federal Home Loan Bank Board objected to the jurisdiction of the District Court over them at the outset, there are numerous instances in which such defendants have not only acquiesced in but availed themselves of the court's jurisdiction and power. These instances undoubtedly will be detailed by the Mallonee appellees in their brief. We will not duplicate their discussion. The threatened hearing by the Board would have concerned many issues in dispute between the Board and the Long Beach Association, which were and are before the court for adjudication. Having these facts in mind, the court properly acted to protect and preserve its jurisdiction by enjoining the threatened Board hearing. The court expressly so found [18 R. 8256], and the finding is unassailable. This exercise of the court's equitable powers was valid and reasonable in the circumstances of the case, to prevent its jurisdiction from being rendered futile by action of the Board. The court could have pursued a more drastic course (such as striking the answer of the Home Loan Bank Board if the hearing had been conducted in face of the court's jurisdiction), but it prop-

erly chose this more lenient remedy. The propriety of orders of the nature indicated is sustained by cases such as the following:

Kline v. Burke Construction Company, 260 U. S. 226, 229;

Doyme v. Saettele, 8 Cir., 112 F. 2d 155, 161;

See:

Long v. Stites, 6 Cir., 63 F. 2d 855, *cert. den.*, 290 U. S. 640.

Conclusion.

It is respectfully urged that the attacks of appellants against the jurisdiction below are without merit and that the order appealed from should be affirmed.

Respectfully submitted,

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APPENDIX.

JUDICIAL CODE, § 57, 28 U. S. C. A. § 118.

(As the same stood at the commencement of the Los Angeles action.)

§ 118. When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and ad-

judication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State.

FEDERAL HOME LOAN ACT, § 12 (12 U. S. C. § 1432).

§ 1432. INCORPORATION OF BANKS; CORPORATE POWERS.

The directors of each Federal Home Loan Bank shall, in accordance with such rules and regulations as the board may prescribe, make and file with the board at the earliest practicable date after the establishment of such bank, an organization certificate which shall contain such information as the board may require. Upon the making and filing of such organization certificate with the board, such bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the board it shall have power to adopt, alter, and use a corporate seal; to make contracts; to purchase or lease and hold or dispose of such real estate as may be necessary or convenient for the transaction of its business, but no bank building shall be bought or erected to house any such bank, nor shall any such bank make any lease for such purpose which has a term of more

than ten years; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, subject to the approval of the board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and, by its board of directors, to prescribe, amend, and repeal by-laws, rules and regulations governing the manner in which its affairs may be administered; and the powers granted to it by law may be exercised and enjoyed subject to the approval of the board. The president of a Federal Home Loan Bank may also be a member of the board of directors thereof, but no other officer, employee, attorney, or agent of such bank, who receives compensation, may be a member of the board of directors. Each such bank shall have all such incidental powers, not inconsistent with the provisions of this chapter, as are customary and usual in corporations generally. July 22, 1932, c. 522, §12, 47 Stat. 735.

No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, SHAREHOLDERS PROTECTIVE COMMITTEE
OF LONG BEACH ASSOCIATION, LONG BEACH FEDERAL
SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COM-
PANY, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY,
et al.,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

Brief for Appellee Long Beach Federal Savings and
Loan Association, Third-Party Plaintiff and Cross-
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No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, SHAREHOLDERS PROTECTIVE COMMITTEE
OF LONG BEACH ASSOCIATION, LONG BEACH FEDERAL
SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COM-
PANY, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY,
et al.,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

Brief for Appellee Long Beach Federal Savings and
Loan Association, Third-Party Plaintiff and Cross-
Claimant Below.

DESCRIPTION OF LITIGATION.

This litigation has thus far involved fifteen (15) proceedings in state and federal trial and appellate courts and two Congressional Investigations. Such proceedings are:

IN THE UNITED STATES DISTRICT COURT, SOUTH-
ERN DISTRICT OF CALIFORNIA.

- (1) No. 5421-P. H., commenced May 27, 1946.
- (2) No. 5678-P. H., commenced August 22, 1946.
- (3) No. 7989-P. H., commenced February 17, 1948.

IN THE UNITED STATES DISTRICT COURT, NORTH-
ERN DISTRICT OF CALIFORNIA.

(4) No. 28203-G, commenced July 22, 1948.

IN THE SUPERIOR COURT OF THE STATE OF CALI-
FORNIA IN AND FOR THE COUNTY OF LOS
ANGELES.

(5) No. L. B.-C. 14492, commenced January 16, 1948.

All of the foregoing are either consolidated into, or enjoined by, the main actions Nos. 5421-P. H. and 5678-P. H., in the Southern District Court.

IN THE UNITED STATES SUPREME COURT.

(6) *Fahey, et al., v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, decided June 23, 1947.

(7) *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041 (a writ of prohibition, mandamus and/or injunction against United States District Judge Peirson M. Hall, denied in June, 1947).

IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT.

(8) *Ammann, et al. v. Mallonee, et al.*, No. 11751, dismissed February 6, 1948.

(9) *Fahey, et al. v. Mallonee, et al.*, No. 11867, dismissed February 25, 1948.

(10) FAHEY, ET AL. V. MALLONEE, ET AL., No. 12511,
ONE OF FOUR APPEALS PRESENTLY PENDING BEFORE
THIS HONORABLE COURT OF APPEALS, THE RECORD ON
WHICH SINGLE APPEAL COMPRISES TWENTY-FOUR (24)
VOLUMES OF OVER ELEVEN THOUSAND (11,000) PRINTED
PAGES.

(11) Petition by Fahey, *et al.*, for writ of prohibition, mandamus or other appropriate writ, v. United States District Judge Peirson M. Hall. Petition presented February, 1950, denied June 1, 1950. (No number assigned.)

(12) Petition by Federal Home Loan Bank of San Francisco, *et al.*, for writ of prohibition, mandamus or other appropriate writ v. United States District Judge Peirson M. Hall. Petition presented February, 1950, denied June 1, 1950. (No number assigned.)

(13) Fahey, *et al.*, v. Ronald Walker, Special Master of the United States District Court, No. 12575, presently pending appeal from order allowing fees to Special Master, taken May 3-5, 1950.

(14) Fahey, *et al.*, v. O'Melveny & Myers, *et al.*, No. 12591, presently pending appeal from order allowing attorneys' fees, taken June 20, 1950.

(15) Fahey, *et al.*, v. Ronald Walker, Special Master of the United States District Court, presently pending appeals from order allowing fees to Special Master, taken about November 28, 1950 and December 8, 1950.

CONGRESSIONAL INVESTIGATIONS.

(1) Tenth Intermediate Report of the Select Committee to Investigate Executive Agencies, Seventy-ninth Congress, Second Session, Investigation of Federal Home Loan Bank Administration, dated July 25, 1946. [R. 9107-9191.]

(2) 1950 Investigation by Holifield's Special Subcommittee of the Committee on Expenditures in the Executive Departments Investigation of Home Loan Bank Board, conducting its investigation into the failure of the Home Loan Bank Board Administration and Federal Home Loan

Bank of San Francisco, *et al.*, to carry out the recommendations of the Select Committee to Investigate Executive Agencies, House of Representatives, 79th Congress, made in July of 1946. Said Investigation is now in recess and scheduled to reconvene early in 1951.

Plate No. 1 are photographs of the Association's offices during run of withdrawals of approximately \$10,000,000 which occurred on appellant's first seizure of the Long Beach Federal Savings and Loan Association in May of 1946.

Plate No. 2 is a graphic picturization by chart of the growth of the Association prior to the run, the extent of the run of withdrawals, and the rebuilding of the Association after its founding management was restored in January of 1948 by a final judgment of the District Court.

Plate No. 3 is a photograph of part of the files found by the trial court, in single copies, to weigh in excess of 150 pounds as of March, 1949, TWO YEARS AGO when only about 9,000 of the 19,000 pages of clerk's transcript had been filed.

The clerk's pagination of the records transmitted to the Court of Appeals includes 19,142 typed pages, EXCLUSIVE OF REPORTER'S TRANSCRIPTS, which exceed 5,000 additional pages.

Appellants, at this stage of the proceedings, by this appeal, seek dismissal and nullification of all of the above listed matters, all because of alleged lack of jurisdiction of the District Court.

Plate No. 1



Plate No. 1



Plate No. 1



Plate No. 1



LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION
JANUARY 1, 1945 TO JULY 15, 1949

SHARE ACCOUNTS

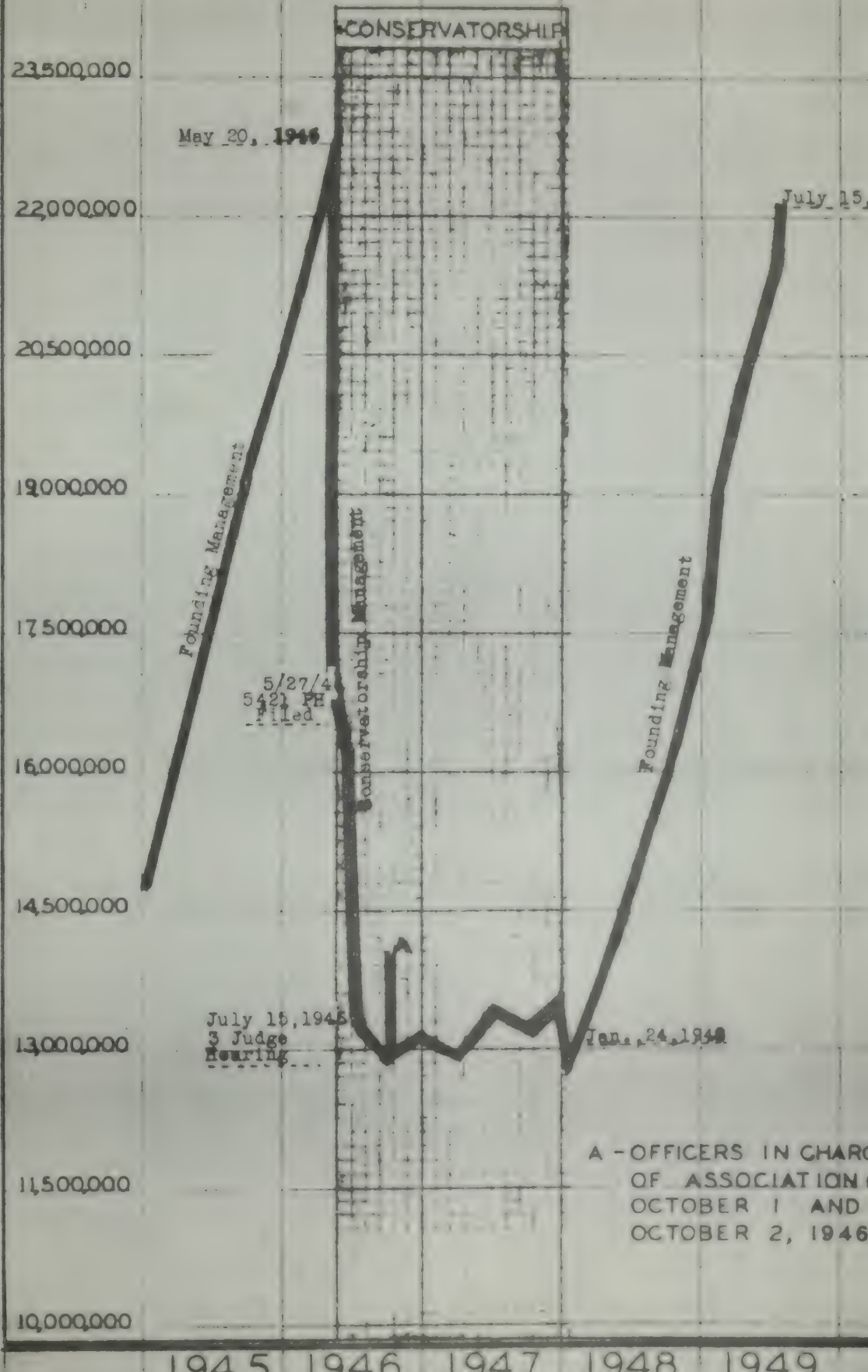


Plate No. 3



JURISDICTIONAL STATEMENT.

Jurisdiction in the Court below of the litigation is claimed by appellees (plaintiffs and cross-claimants below) to exist under many United States Statutes.

Essentially, these are actions for the recovery of physical possession of, for quieting title to and to determine ownership of approximately \$150,000,000.00 of real and personal property, all physically located within the District of the Court below.

In addition, the actions seek to remove clouds, liens and encumbrances upon the title and ownership of such real and personal property. The action is stated in the jurisdictional paragraphs of the various complaints, cross-claims, third party complaints and similar documents to arise under the following:

1. UNDER SECTION 118 OF TITLE 28, U. S. C. A.
as it existed at the commencement of the litigation in 1946 and as re-enacted in 1948 into Section 1655 of New Title 28.

2. IN INTERPLEADER UNDER:

(a) Title 28, Section 41, subdivision 26, U. S. C. A., as it existed at the commencement of this litigation in 1946, and as presently amended in Title 28, Sections 1335, 1397 and 2361;

(b) Interpleader under Rule 22 F. R. C. P. as it existed in 1946, at the time of the commencement of the action, and as presently amended;

(c) The inherent equity interpleader under bills in interpleader and bills in the nature of interpleader under jurisdiction of federal courts at the time of their creation under the U. S. Constitution upon the founding of the nation.

3. UNDER THE ADMINISTRATIVE PROCEDURE ACT, U. S. C. A., Title 5, Sections 1001 to 1011, Public Law 404, 79th Congress, Chapter 324, Second Session; and particularly Section 1009 U. S. C. (Section 10 of said Act), which provides in part as follows:

“Section 10(A) Right of Court Review.

“Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

4. BY GENERAL APPEARANCE AND CONFESSION OF JUDGMENT by appellants before the Court below through their certified resolution ordered by them to be filed with the Court. [Ftn. 7, R. 8231-8232.]

5. BY AFFIRMATIVE RELIEF asked by appellants and received from the Court below. [R. 3404, 4613, 10303-10334.]

6. BY APPELLANTS DOING BUSINESS in California under the provisions of Section 1391, Title 28, U. S. C. and related enactments.

Diversity of Citizenship.

Diversity of citizenship is likewise grounds for exercise of the said jurisdiction of the court below.

Original plaintiffs Mallonee, Newhouse and Bucklin were alleged to be citizens of California, suing on behalf of the 16,000 shareholder depositors of the seized Association. [R. 509.]

Original defendants Fahey, Ammann, and Fahey's successor defendants Divers, Adams, and LaRoque, are all admittedly citizens of states other than California, Fahey being a resident of Massachusetts, Ammann of Maryland, Divers of Ohio, Adams of New Jersey, and LaRoque of North Carolina. [R. 4812.]

The requirement that the amount involved be in excess of \$3,000.00 does not seem to require comment!

Federal Questions.

Federal questions involved are the constitutional interpretation, application, and effect of:

(1) The Federal Home Loan Bank Act, 47 Stat. 725, 50 U. S. C., App. 601, under which defendants Federal Home Loan Banks of San Francisco, Portland and Los Angeles, were organized and exist, and the ownership of the over \$120,000,000.00 of their assets, involved in this litigation.

(2) The Home Owners Loan Act of 1933, 48 Stat. 128, 12 U. S. C. 1461, et seq., under which appellee Long Beach Federal Savings and Loan Association was organized and exists, and upon the application, interpretation and effect of which ownership, of its more than \$26,000,000.00 in assets involved in this litigation, is to be determined.

(3) The National Housing Act, 48 Stat. 1246, 12 U. S. C. 1724, et seq., under which defendants Federal Savings and Loan Insurance Corporation was organized and exists, and upon the application, interpretation, and effect, of which its liabilities in said litigation, alleged to exceed \$20,000,000.00, are to be determined.

The jurisdictional paragraphs of the various complaints, cross-claims, third party complaints, and other pleadings, contain references to many additional Acts of Congress, sections of the United States Constitution, Regulations, purportedly adopted under one or more of said Acts of Congress, and other sources of federal questions. However, we feel sufficient has been here stated to show jurisdiction over federal questions in addition to diversity of citizenship. Further complete treatment of jurisdiction will be found under appropriate headings of this brief.

Jurisdiction of This Honorable Court of Appeals.

A sharp difference exists between appellants and appellees as to the proper scope of the review under this appeal from a preliminary injunction. Appellants contend the Court of Appeals should review all proceedings in the five years of prior litigation while appellees contend that only abuse of discretion by the court below in granting the preliminary injunction is the proper subject of inquiry in this appeal.

PARTIES TO THE LITIGATION.

There are more than 400 different parties to the several actions in the District Courts. [R. 8270.] In addition there are numerous class actions; among them:

(a) Appellees original plaintiffs Shareholders Protective Committee, representing the 16,000 depositors of the Long Beach Association, seeking to recover its \$26,000,000.00 in seized assets and accounting therefor. [R. 8273-8274.]

(b) Appellees six association plaintiffs in the Los Angeles Bank action, representing the 172 association stockholders of the seized Los Angeles Bank, seeking to recover its \$46,000,000.00 in seized assets. [R. 9465-9501.]

(c) Appellees Long Beach Association (whose \$26,000,000.00 in assets were seized by certain of appellants and restored by order of the court below), acting on behalf of all of the 300 or more of the class of stockholders of appellant San Francisco Bank, seeking dissolution of such bank by the action of a majority of the voting power of the stock of such San Francisco Bank. [R. 4553.]

(d) Appellee Title Service Company, as trustee for the 8,000 borrowers from the Long Beach Association, seeking to clear the titles to their homes clouded and encumbered by the seizures and confiscations by appellants of the \$46,000,000.00 Los Angeles Bank and the \$26,000,000.00 Long Beach Association. [R. 2683.]

(e) Almost two years after the filing of the first class action and just one day before the removal of the conservator, Newendorp and Bradley filed a new class action in the Los Angeles County Superior Court, seeking to prevent the removal of the conservator and to make restoration of the founding management impossible. [R. 8385-8389.]

(f) July 22, 1948, ten associations in the San Francisco Bay Area referred to as the "Northern Ten," one day before a meeting of the Board of Directors of the San Francisco Bank, which meeting was attended by members of the Home Loan Bank Board for the purpose of taking action to compromise the entire litigation, sued the officers and directors of the San Francisco Bank to enjoin and prevent such settlement. The action was filed in the Northern United States District Court at San Francisco, California. (None of these 10 associations are parties to this appeal.) [R. 8365-8375.]

This explanation of parties is made to shorten reference necessary throughout the briefs.

PARTIES TO THIS APPEAL.

OF THE MORE THAN 400 PARTIES, MANY IN CLASS ACTIONS, ALL AFFECTED AND BOUND BY THE PRELIMINARY INJUNCTION—ONLY A FEW HAVE TAKEN THIS APPEAL.

Appellants are:

Appellants Home Loan Bank Board and the individual members, Divers, Adams and LaRoque, and their agents and subordinates, Fahey, Ammann, and Bramley, who threaten the second seizure of the Long Beach Association. [R. 8269.]

Appellant Federal Savings and Loan Insurance Corporation, sue or be sued corporation, created by Act of Congress, is simply appellants Divers, Adams and LaRoque, in another capacity, as they are its sole governing authority, its trustees under the terms of the Act. [R. 8269, Finding 55.]

Appellant John H. Fahey, was the one man Home Loan Bank Board at the time of the original seizures and confiscations. [R. 3193.]

In summation, the parties appellant are Home Loan Bank Board, its members and agents, its *alter ego*, Federal Savings and Loan Insurance Corporation, and San Francisco Bank. [R. 8269-8270.] The purpose of their appeals is hereinafter discussed under that heading. All appellants have either made general appearances or were served within the jurisdiction of the court below. [R. 8284, 8301-8302.]

STATEMENT OF THE CASE.

SEIZURES AND CONFISCATIONS WHICH CAUSED THE LITIGATION.

LOS ANGELES BANK SEIZURE.

On March 29, 1946, there existed at Los Angeles, California, the Federal Home Loan Bank of Los Angeles. The Bank had been founded in 1932 with an initial capital of \$10,000,000.00 [R. 4559] and in fourteen years had grown to \$46,000,000.00. Its assets approximated \$46,000,000.00. [R. 3198.] It was completely solvent, prosperous and growing. Its surplus was approximately \$1,900,000.00. It had never been accused of misconduct or wrong-doing of any nature. It had been examined by appellants on March 15, 1946 (just two weeks prior to its seizure). The examination contained no criticism whatsoever, nor did it mention any matters requiring correction.

On the forenoon of March 29, 1946, a seizing party, consisting of appellant Ammann, defendant Johnson (the then President of appellant Federal Home Loan Bank of Portland, and other henchmen of appellants), entered the premises of the Los Angeles Bank and seized possession of the Bank and all of its assets. [R. 9107-9191.]

As authority for such seizure, they produced Orders Nos. 5082, 5083 and 5084 [R. 8225-8228] of the Federal Home Loan Bank Administration, CERTIFIED TO BY APPELLANT AMMANN. [R. 8228.] By the terms of these orders the solvent, prosperous and growing Los Angeles Bank was, without notice, hearing, trial, or accusation, liquidated, dissolved and merged, instantaneously and summarily, as of the moment of the service of the seizure

orders. Its \$46,000,000.00 in assets were purportedly transferred to the \$9,000,000.00 Portland Bank, whose President was then present and received possession of the seized \$46,000,000.00. [R. 8225.]

Appellant San Francisco Bank is the creature of these seizures. Its existence, if any, arose from the “merger” of the Los Angeles Bank into the Portland Bank, the result of which was the purported San Francisco Bank.

The Los Angeles Bank had approximately 172 stockholders [R. 4559], among them the appellant Long Beach Association, which owned Los Angeles Bank stock of a par value of \$340,000.00 and an actual value of approximately \$400,000.00. [R. 3248.] The Los Angeles Bank held for safekeeping (and for no other purpose) \$8,300,000.00 of U. S. Government Bonds owned by, and the property of, appellee Long Beach Association. [R. 8402.] The President of appellee Long Beach Association T. A. Gregory, was one of the directors of the Los Angeles Bank. He spearheaded the fight for the return of the seized Los Angeles Bank. [R. 4566.]

A committee of the stockholders of the seized Los Angeles Bank was formed. It sought a Congressional Investigation of the confiscation and seizure, retained counsel, and commenced preparation of legal proceedings to recover the \$46,000,000.00 of seized Los Angeles Bank assets. [R. 4566.]

LONG BEACH ASSOCIATION SEIZURE.

Appellee Long Beach Association had been founded in 1934 with an initial capital of \$7,500.00. In twelve years, it had grown to have \$26,000,000.00 in assets and a surplus, reserves and undivided profits of approximately

\$1,300,000.00. It had 16,000 depositors and approximately 8,000 borrowers. [R. 3195.] In the last month before its seizure, it had grown approximately \$500,000.00 in new deposits. [R. 3218.]

On May 20, 1946, just fifty-five days after the seizure, confiscation and destruction of appellee Los Angeles Bank, appellee Long Beach Association was similarly without notice, hearing, or trial seized and its confiscation attempted. Appellant Ammann, again with a swarm of henchmen, entered the offices of the Long Beach Association and presented a plain, uncertified, unsigned, typed copy of Order No. 5254, purporting to appoint appellant Ammann as conservator for the Long Beach Association. [R. 8229.]

The President of the Long Beach Association at first refused to surrender the \$26,000,000.00 in cash, bonds, and negotiable securities, whereupon appellant Ammann signed his own name, certifying to the order appointing himself as conservator for the institution. Ammann threatened criminal prosecution for violation of the laws of the United States unless possession of the Association was immediately surrendered. The order bore no seal, and its only authentication was appellant Ammann's signature. [R. 8229-8230.]

The Association's President demanded receipts or acknowledgments for the \$26,000,000.00 in cash, government bonds, and negotiable securities thus seized. Receipts were summarily refused and were never given. [R. 208, 8279.]

Approximately five months later, after repeated demands by the Shareholders Protective Committee, pur-

ported inventories of the assets of the Association were furnished by appellant Ammann. [R. 8678.]

The order, signed by Ammann appointing himself as conservator of the Association, contained no factual charges of any kind. It merely stated that the institution, which had grown from \$7,500.00 to \$26,000,000.00 under the founding management from which it was seized, had been “mismanaged” was “unfit,” “unsafe,” “jeopardizing the public,” etc. [R. 8229.]

Newspaper publicity followed the seizure upon these charges. Appellant Ammann mailed a statement of the charges to all of the 16,000 depositors. A run of withdrawals of multi-million dollar proportions immediately ensued. The run aggregated \$10,000,000.00 of deposits in the Association at the time of the seizure. [R. 8249.]

A Shareholders Protective Committee was formed (appellees Mallonee, *et al.*) and it, on May 27, 1946, one week after the seizure, brought the first of the fifteen court proceedings, itemized under Description of the Litigation.¹ The action was a class action on behalf of all of the 16,000 shareholders, and was *in rem* for the return of the seized \$26,000,000.00 of assets, the restoration of the Association to its founding management, for an accounting and for other relief. The Association was threatened with a merger, liquidation and dissolution similar to that

¹This and the 1946 class action by the stockholders of the seized Los Angeles Bank are the only actions by the appellees. The other 13 were brought by appellants or defendants.

which had engulfed the Los Angeles Bank less than about seven weeks before. [R. 2355.]

The Shareholders Protective Committee sought, and obtained from the court below, a Temporary Restraining Order against merger, commingling, or transfer of the Association's assets. The order was served upon appellant Ammann immediately after its issuance on May 27, 1946. This restraining order was flouted and ignored by all appellants, as is disclosed by the attempted accounting of Ammann and objections thereto. [R. 8614-8742. Because appellants desired to amend and supplement their accounting, it was returned without being printed from the Clerk of the Court of Appeals to the Clerk of the District Court, so as to be available for proceedings.]

Notwithstanding the restraining order, \$12,000,000.00 of Association's deeds of trust (nearly one-half of all of the \$26,000,000.00 in assets of the Association), were assigned by appellant Ammann to appellant San Francisco Bank. [R. 8656.] This is one of the assignments which appellants claim cannot be the subject of any court proceeding or review.

The officers of the Association, seeking to ascertain what, if any grounds, were alleged to justify the summary seizure of their \$26,000,000.00 Association, demanded a "More Definite Statement" of the causes of seizure and an administrative hearing before appellant Fahey, as provided in the then regulations of appellants. [Ftn. 4, R. 8218.] .

FIRST CONGRESSIONAL INVESTIGATION.

Congressional action which had been lagging, was spurred by the second seizure and confiscation. In June 1946, the Special Committee to Investigate Executive Agencies of the Seventy-ninth Congress, Second Session, commenced its hearings. The unanimous report of the Congressional Investigating Committee condemned both seizures and confiscations, recommended immediate restoration of the Los Angeles Bank and the removal of appellant Ammann as conservator for the Long Beach Association. [R. 9107-9191.]

THREE JUDGE COURT.

The Shareholders Protective Committee's court action had attacked the confiscation of the Long Beach Association as unconstitutional, and sought an injunction preventing appellant Ammann continuing as conservator, it therefore required the convening of a statutory three-judge court. [R. 362-377.]

The Court met at Los Angeles and consisted of Honorable William E. Orr, Circuit Judge, Honorable Peirson M. Hall and Honorable Dave W. Ling, District Judges. The hearing continued over July 15 and 16, 1946. [R. 512-519.] In September 1946, the three-judge court announced its unanimous opinion that the Act of Congress, claimed to authorize Ammann's seizure of the Long Beach Association was unconstitutional. [R. 599-605.]

Appellants immediately appealed this decision to the United States Supreme Court. They applied *ex parte* for a stay order before Justice Rutledge of the Supreme Court, and enforcement of the Order of the three-judge court, which was already executed by removal of appellant Ammann, was stayed. [R. 762-763.]

Upon receipt of the Supreme Court stay order, Ammann resumed possession of the Association's business and affairs and continued in such possession. [R. 793-794.]

In January, 1948, after further proceedings, an order of the District Court at Los Angeles removed Ammann as conservator and restored the Association to its founding management. [R. 8310-8327.]

The Congressional Investigating Committee report was ignored by appellants, until in July of 1947, the Federal Home Loan Bank Administration was reorganized. The one-man commissioner, appellant Fahey (who had replaced the five-man board created by the original Federal Home Loan Bank Act of 1932), was now replaced by a three-man Home Loan Bank Board. [R. 2541-2551, 2771-2772, 2778.]

The three-man Home Loan Bank Board which replaced appellant Fahey, as one-man commissioner, consisted of Fahey, as Chairman and two new board members. The terms of the original Federal Home Loan Bank Act had required a bi-partisan board of five members, not more than three of which could be members of one political party. (Federal Home Loan Bank Act, 47 Stat. 725; 12 U. S. C. 1421, 15 U. S. C. 602.) The new three-man board was required to have at least one member of the minority party as a board member. (Reorganization Plan No. 3 of 1947, 12 F. R. 4981.)

ADMINISTRATIVE HEARINGS.

In May of 1946, immediately after the seizure of the Association, the Association's officers had requested an administrative hearing before appellant Fahey and such hearing was set for July 3, 1946, in Los Angeles. [R. 144-147.] In the meantime, the First Congressional Investigating Committee had conducted its hearings, at which hearing, appellants Fahey and Ammann had both testified at length. Harold Lee, then governor of the Federal Home Loan Bank Administration, had also testified. The testimony of appellants and their subordinates was clear. The substance of their testimony was that under no circumstances would they ever return the Association to its founding officers and directors. [R. 193.]

On March 25, 1946, just one day before the seizure of the Los Angeles Bank, appellant Fahey adopted a resolution that neither he, nor any of his subordinates should be thereafter subject to the subpoena power (*duces tecum* or otherwise) of any court, state or federal. [R. 9498-9501.]

Appellees Shareholders Protective Committee, claiming that the Act of Congress under which Ammann was appointed was unconstitutional [R. 362-371], applied for and obtained a temporary restraining order against the administrative hearing being held prior to the consideration by the three-judge court at Los Angeles, of the constitutionality of the Act of Congress. [R. 372-377.] The three-judge court, after hearings, decided that the act was unconstitutional and ordered removal of Ammann as conservator. It also enjoined the administrative hearing called under the unconstitutional act of Congress. [R. 599-605, 743-758.]

In reversing this judgment, the United States Supreme Court approved either or both administrative hearings or Court proceedings, to inquire into the merits of the claims of mismanagement made by appellants as grounds for the seizure and the charges made by appellees Shareholders Protective Committee, *et al.*, that fraud and malice were the causes of the unjustified seizures. [*Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030 (June 23, 1947).] After the Supreme Court remand, the administrative hearing originally requested by the officers was reset for December 15, 1947, at Los Angeles. [R. 8230.] The Shareholders Protective Committee and the Association protested against the administrative hearing, interfering with issues pending before the Court for decision. [R. 2914-2944, 8230-8231.] The protests were heeded and the new three-man Home Loan Bank Board by a two to one vote vacated the administrative hearing set for Los Angeles, California. The one-man voting for the administrative hearing was appellant Fahey. Within a few days thereafter, he was no longer a member of the Home Loan Bank Board, the President of the United States failing to nominate him for this position upon the adjournment of the 79th Congress.

RESCINDING OF APPOINTMENT OF CONSERVATOR.

In January of 1948, there was a vacancy in the three-man Home Loan Bank Board. The board now consisted of appellant Divers, the latest nominee of the President, as Chairman, and appellant Adams, who had again been nominated as a board member. On January 17, 1948, the two member Home Loan Bank Board unanimously adopted its Order No. 388 [Ftn. 7, R. 8231-8233], which among other things, rescinded the appointment of appel-

lant Ammann as conservator, required him to account with the court below for the \$26,000,000.00 of Association assets which he had seized without a receipt in 1946. The order, by its terms, required that a certified copy of such resolution be FORTHWITH filed with the District Court at Los Angeles. [Ftn. 7, R. 8231.]

Upon filing of the order with the Court, the Shareholders Protective Committee presented a petition to the Court for a Court Order; removing appellant Ammann as conservator, requiring him to account and to otherwise carry out the terms of Order No. 388. [R. 3409-3420.]

GENERAL APPEARANCE BY APPELLANTS.

The Court below has found that the filing of Order No. 388 with the Clerk of the Court was a general appearance by appellants Home Loan Bank Board before the Court below. [Finding 77, R. 8283-8284, Conclusion 16, R. 8301-8302.] Appellants Home Loan Bank Board, Ammann and others, were represented at the hearing before the District Court upon the removal of Ammann as conservator. [R. 10306-10307, 10333.]

Although Order No. 388 is completely silent on the question of any election of officers prior to removal of Ammann as conservator, appellants Home Loan Bank Board caused a telegram to be read to the District Court in which they claimed the order was not completely effective until an election of officers and directors had been held. [R. 10311-10314.]

They likewise requested the District Court to require a \$1,000,000.00 surety bond of the officers and directors upon their restoration. **The District Court granted**

the relief requested by appellants, the million dollar surety bond was furnished, and is yet on file with the District Court in full force and effect, and an election was held. [R. 8318, 10333-10334.]

APPOINTMENT OF SPECIAL MASTER.

The District Court also granted the Home Loan Bank Board's request for an election of directors but instead of holding the election prior to the removal of Ammann as conservator, the Court appointed its special master to conduct a Court supervised election of directors by all the shareholders of the Association. [R. 8326, 10328.] The special master was likewise ordered to supervise the return by appellant Ammann of the seized assets, books and records of the Association to the founding officers and directors. [R. 8324-8325.]

The special master selected by the Court was Ronald Walker, Assistant United States Attorney, one of the attorneys for appellants Home Loan Bank Board and Ammann Throughout the first twenty months of the litigation. [R. 9107-9191.]

All parties including the Association and the Shareholders Committee consented to Assistant United States Attorney Walker taking a leave of absence from the United States Attorney's office to act as the Court's Special Master, in conducting the election of directors by the shareholders of the Association and in supervising the return of the seized assets, books, etc. [R. 10326.]

The consent of appellants Home Loan Bank Board, Ammann, *et al.*, to the order appointing their attorney Ronald Walker as Special Master, was signed by the other attorneys for such appellants without reservation,

special appearance, or any objection to the jurisdiction. Such signature being by Honorable James M. Carter, then U. S. Attorney and now District Judge, and “Principal Attorney” William F. McKenna. [R. 9107-9191.]

The election requested by appellants was held by the former United States Attorney (now Special Master) and resulted in the unanimous re-election of the entire board of directors without a single dissenting vote. [R. 6119-6120.]

CALIFORNIA STATE COURT ACTION.

On January 16th, just one day before appellants Home Loan Bank Board adopted their Order No. 388, rescinding the appointment of Ammann as conservator and making their general appearance before the District Court, Newendorp and Bradley, two depositors of the Association (whose combined deposits aggregate less than \$2,000.00) [R. 3946-3947], filed a complaint in the State Superior Court for Los Angeles County against: (1) the Association, (2) its officers and directors, (3) some of its principal customers, (4) Title Service Company, trustee on the Associations deeds of trust, (5) the Association's former attorney, and (6) various others. [R. 9585-9644.] The complaint asked approximately \$2,000,000.00 in damages for alleged mismanagement and misconduct of the founding officers and directors [R. 9636-9638], prior to the appointment of Ammann as conservator and was filed to make impossible the restora-

tion of the Association to its founding management. [R. 9585-9644.]

Newendorp and Bradley claiming to sue on behalf of all of the 16,000 depositors of the Association to prevent Ammann's removal were directly conflicting with the *Mallonee* case brought twenty months previously in the Federal Court by the Shareholders Protective Committee, duly licensed as such by the State of California. [R. 8377-8398.] The Newendorp and Bradley action was therefore removed to the Federal Courts and Newendorp and Bradley named as defendants in the *Mallonee* action. [R. 3459-3460.] Newendorp and Bradley defaulted to the complaint in the *Mallonee* action and did not present any of their charges to the Federal Court. [R. 3623-3624.]

They had sought in the state court proceedings to obtain a receivership for the Hotel building in which the Association conducted its business and which was owned by the Association. [R. 9697-9700.] Their charges were so identical with the charges put forth by appellants Ammann, Fahey, *et al.*, in the "More Definite Statement," that the District Court enjoined prosecution of the state court action except that any issues therein raised might be presented to the Federal Court in the pending *Mallonee* case, the original class action on behalf of all of the 16,000 depositors. [R. 10100-10121.] This injunction although preliminary, has never been appealed from and Newendorp and Bradley have never presented any of their charges to the District Court for Consideration.

\$14,000,000.00 DEPOSIT IN COURT.

Upon the return of the Association to its founding management (under order of the District Court) they found that appellant Ammann had (1) transferred to appellant San Francisco Bank almost all of the Association's \$12,000,000.00 of Deeds of Trust, (2) had pledged more than \$5,000,000.00 of the Association's Government Bonds to the San Francisco Bank, and (3) that there were \$400,000.00 of outstanding loan commitments made by appellant Ammann and not disclosed on the Association's books. [R. 8637, Ftn. 9, R. 8238.]

Appellant San Francisco Bank claimed to hold all of such deeds of trust and Government Bonds as assignee of appellant Ammann, notwithstanding the restraining order by the Court below, preventing appellant Ammann from transferring such assets and notwithstanding the recorded *Lis Pendens* describing each of such deeds of trust. [R. 3690-3704.]

The assignments of the notes and deeds of trust as signed by Ammann on the back of said notes, was by undated rubber stamp, therefore the actual date of the transfers was difficult to establish. [R. 9107-9191.]

However, the San Francisco Bank held almost \$14,000,000.00 of Long Beach Association assets, possession and title to which it had acquired from appellant Ammann. It claimed to hold them as security for an obligation created by appellant Ammann in the amount of \$6,300,000.00. [R. 3690-3704.] There was thus an excess collateral of approximately \$8,000,000.00. [R. 3707.] The \$6,300,000.00 obligation claimed by the San Francisco Bank against the Long Beach Association arose from the transfer by the San Francisco Bank to appellant Ammann of approximately \$7,300,000.00 of seized Los

Angeles Bank assets obtained by appellant San Francisco Bank when Ammann and the President of the Portland Bank seized the Los Angeles Bank and all its assets on March 29, 1946. [R. 3708-3709.]

The Los Angeles Bank claimed the loan of \$7,300,000.00 from San Francisco Bank to Ammann was made with the seized assets, as to at least 5/6 or 83% thereof. [R. 3644-3645, 8404.] The San Francisco Bank likewise claimed payment to it of the full amount of Ammann's obligation. [R. 3690-3704, 3707, 8405.] The Long Beach Association denied all liability for Ammann's obligations to the San Francisco Bank except only such benefits, if any, as the Association had received by Ammann's use of the money. [R. 8405-8406.]

The Association in February, 1948, shortly after its restoration, obtained an order to show cause from the District Court, directed to the Portland, San Francisco and Los Angeles Banks, requiring the deposit into the Registry of the Court of all the disputed assets. [R. 3599-3601.] Opposition to such motion was filed and hearings conducted before the District Court. Subpoenas compelled the production by the San Francisco Bank of documentary evidence and testimony by officers of the San Francisco Bank. After such hearings the Court below ordered the deposit into the Registry of the approximately \$14,000,000.00 of notes, trust deeds, government bonds and securities. Appellants San Francisco Bank complied with the requirement of the District Court's order and such deposit was made. [R. 8399-8525.] No appeal was ever taken from such order of deposit. Application to vacate the order of deposit was made by appellants and denied.

SETTLEMENT NEGOTIATIONS.

Immediately after the removal of Ammann as conservator, negotiations to compromise the entire litigation and for restoration of the seized Los Angeles Bank were commenced by the appellants, appellees and all interested parties. [R. 7425-7429.] These negotiations had progressed to the point where the Board of Directors of appellant San Francisco Bank was about to consider at its meeting in Missoula, Montana, on July 23, 1948, a compromise of this entire litigation. [R. 5385.] This meeting was attended by a member of the Home Loan Bank Board, and various other representatives of appellants.

Just one day before the meeting, ten Northern Associations situated in the San Francisco Bay Area, filed Action No. 28203-G in the Northern United States District Court at San Francisco and obtained an order to show cause returnable August 9, 1948, seeking to prevent the Board of Directors of the San Francisco Bank from compromising the pending litigation. [R. 4641-4659.]

The ten Northern Associations and all 300 of the Members of the purported San Francisco Bank had about only a few days previously been served by an Order to Show Cause issued by the District Court at Los Angeles, looking towards dissolution of the San Francisco Bank by vote of a majority of the voting power of the stockholders of such bank. [R. 4593-4597.] The Order to Show Cause was based upon a motion filed by the restored Long Beach Association on behalf of all of the stockholders of the San Francisco, Portland or Los Angeles Banks (whichever existed) for dissolution of the San Francisco Bank and the restoration of the Portland and Los Angeles Banks upon vote of the majority of the voting

power of the stockholders of any and all of such banks. [R. 4552-4586.]

Further prosecution of the Northern Ten Action in the District Court at San Francisco was enjoined by a preliminary injunction issued by the District Court at Los Angeles on the grounds, among others, that: (1) all of the issues raised by the Northern District Court action were already pending and had been pending for more than two years in the Court below; (2) that all of the plaintiffs and defendants in the Northern Ten Action at San Francisco were already parties to the Southern District Court action at Los Angeles. [R. 8362-8376.]

This preliminary injunction pending trial on the merits in the Southern District Court was never appealed from and is still in effect. [R. 8275.]

Settlement negotiations were almost incessant during the entire year of 1948 and so continued through 1949, until October. Only those steps essential to preserve the parties rights and prevent lapse or expiration thereof were taken in the litigation. [R. 8239-8240.]

In December 1948-January 1949, the "Portland Conference" (referred to in various settlement reports) was thought to have settled all phases of the litigation. [Ftn. 10(b), R. 8241.] The parties, under the direction of defendant Harold C. Holmes, deceased, then President of the San Francisco Bank (who announced upon his election that he was to be the last President of the San Francisco Bank and had been elected to complete its dissolution) participated in settlement conferences extending over many weeks. [R. 7445, 7460-7564.]

These settlement conferences were for the preparation of appropriate petitions to embody the terms of compromise and to result in a compromise judgment by the

District Court to terminate the litigation by permanent injunction, restore the Los Angeles Bank, and otherwise implement the various terms of the compromise. [R. 7431.]

ATTORNEYS' AND SPECIAL MASTER'S FEES.

Appellants Fahey and Home Loan Bank Board have claimed as part of their supervisory rights, the power to regulate and approve the employment of attorneys and the rates and amounts of compensation of attorneys for Federal Home Loan Banks and Federal Savings and Loan Associations. They assert that attorneys suing the Home Loan Bank Board cannot receive any compensation except such as the Home Loan Bank Board, defendants in the litigation, approves for the plaintiffs' attorneys. [R. 6381-6390, 6527-6566, 10743-10754, reference is also made to Appeal No. 12591, presently pending in this Honorable Court of Appeals and the record thereon.]

When the Los Angeles Bank stockholders were about to sue appellant Fahey for the seizure and confiscation of the Los Angeles Bank, Fahey and Ammann conducted spot checks of the members of the bank, as to who had appropriated how much, to what attorneys. Fahey and Ammann were the defendants who were to be sued by these appropriations. [R. 9323-9327.]

After the confiscation of the Los Angeles Bank and the intimidations of its stockholders by spot checks as to employment of counsel, the directors of the Long Beach Association, anticipating a similar confiscation and de-

struction of their Association, adopted the following resolution [R. 3237-3238]:

“Whereas there have been indications that retaliation against this association by those purported to be representing the Federal supervising authorities because the representatives of this association, duly elected as a director of the Federal Home Loan Bank of Los Angeles, did not disregard the legal rights and best interests of said bank and submit to the dictation of the Federal Home Loan Bank Commissioner; and

“Whereas such retaliations are unwarranted and violate the principles of our democratic government and are detrimental to the best interests of this association: Now, therefore, be it

“*Resolved*, That the officers of this association be and they are hereby authorized to employ legal counsel to conduct appropriate legal proceedings to restrain said Federal Home Loan Bank Commissioner or his deputies from interfering with the normal and proper conduct of this association’s affairs.

“The sum of \$100,000 is hereby appropriated and authorized to be expended for that purpose.”

At the first Congressional Investigation in 1946, Harold Lee, Governor and former Chief Counsel of the Federal Home Loan Bank System, 76 days after the seizure and confiscation of the Los Angeles Bank, and 26 days after the Long Beach Association seizure, testified:

“Mr. Fischbach: Now, what facts did you have before you as an official of the Administration upon which you predicated the determination to appoint a conservator?

“Mr. Lee: . . . as I said before, the principal fact was the appropriation of \$100,000. The other facts were supplemental. That is the principal fact.”

(Reference is made to page 187, Transcript of Special Committee To Investigate Executive Agencies House of Representatives, Seventy-Ninth Congress, Second Session, Pursuant to H. Res. 88, Part 7, Complaints of Federal Home Loan Bank of Los Angeles and Federal Savings and Loan Association of Long Beach Against The Federal Home Loan Bank Administration.)

The “More Definite Statement” [Ftn. 4, R. 8218-8224] sets forth as one of the principal grounds for the seizure of the Long Beach Association, the payment of a \$50,000.00 cashiers’ check in partial fulfillment of said resolution.

Appellants, in their opening brief, on pages 64 and 65, said:

“. . . the Home Loan Bank Administration was authorized and indeed charged with the duty to prevent such disbursement.”

The Association and the Shareholders Committee’s position has been diametrically opposed to appellants on the questions of attorneys’ fees. The \$50,000.00 cashiers’ check was deposited in the Registry of the Federal Court, uncashed and unendorsed, by the Association’s attorney on June 12, 1946. [R. 86-100, 8267-8268.] Not one cent has been paid from Association funds or assets for attorneys’ fees in this litigation, except on order of the District Court.

The Court’s orders have been made upon funds in the Registry of the District Court and paid solely from such funds. The Shareholders Protective Committee and the

Association do not believe that their rights to due process and a fair trial before the Federal Court can be circumvented and prevented under the guise of supervision or regulation by appellants Home Loan Bank Board, Fahey, Ammann, or the San Francisco Bank. [R. 9099.]

No attorney can be expected to vigorously prosecute litigation against defendants who are to regulate what, if any, fees the prosecuting attorney is to receive for his services against those defendants. Appellants' pretenses of supervision and regulation of attorneys' fees were shown to be sham and false, when the District Judge in March of 1947, made an interim allowance on account to the attorney for the Shareholders Protective Committee only. [R. 2350-2363.]

Appellants' response was to make the District Judge a defendant in the U. S. Supreme Court in a petition for a writ of mandamus and/or prohibition and/or injunction. The U. S. Supreme Court rejected appellants' contentions in its opinion in *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, wherein it said:

“ . . . an allowance of \$50,000 will hardly wreck a \$26,000,000 institution during the time it would take to prosecute an appeal.”

Notwithstanding the Supreme Court opinion, appellants resisted payment of the \$50,000.00 allowance, and even sought to prevent payment to the Shareholders Protective Committee of \$17,000.00 in Expenses.

According to appellants, the Shareholders Committee, representing the majority of the 16,000 shareholders, couldn't use any of their own money to sue Ammann and remove him as conservator, unless Ammann and his superior, Fahey, “supervised” and “regulated” the amount

of such attorneys' fees and expenses. [Reference is made to Appeal No. 11751, Petition and Motion for Stay of Execution To Prevent Payment of Interim Allowances On Account of Fees and Expenses, which was denied by this Honorable Court of Appeals for the Ninth Circuit on February 25, 1948. See also Rule To Show Cause, and Motion for Leave to File Petition for Writ of Prohibition and/or Injunction, etc., R. 1477-1497.]

After the Supreme Court opinion, stay of the payment of the order for attorneys' fees was denied by the District Court [R. 2464-2478], appellants immediately appealed to this Honorable Court of Appeals for the Ninth Circuit. Hearings on the motion for stay were argued before this Court of Appeals November 10, 1947, during a recess in hearings then proceeding before the District Court. (See Court of Appeals Docket in Appeal No. 11751.)

On December 8, 1947, this Honorable Court of Appeals denied the stay and ordered payment of the interim allowance on account of attorneys' fees and expenses. (See Court of Appeals Docket in Appeal No. 11751.)

For the first time in the litigation, nineteen months after it was commenced, the shareholders, after successfully fighting through the District Court, the U. S. Supreme Court and this Honorable Court of Appeals, were allowed the use of some of their own money to litigate for the recovery of their \$26,000,000.00 in assets.

Ten days later the administrative hearing was indefinitely postponed. [R. 6288.] Forty days later, the appointment of Ammann as conservator was rescinded, and he was required to return the assets of the Association and

to account to the District Court, all by actions and resolutions taken by appellants themselves. [Ftn. 7, R. 8231-8232.]

This Honorable Court of Appeals can draw its own conclusions as to what the appellants thought as to the merits of their charges when they faced a trial before an impartial Federal Court in an action brought by a shareholders committee, now sufficiently financed to try the case.

After the stay of execution was denied by this Honorable Court of Appeals, the appeal on attorneys' fees was still pending. Before preparation of a record on appeal, or any other hearing before this Court of Appeals, appellants dismissed their own appeal to prevent a hearing of such appeal on the merits. [R. 3550-3552.]

During the settlement negotiations appellants had insisted that they must regulate and supervise the amount of attorneys' fees to be paid to the shareholders, association and others' attorneys, who had successfully recovered the seized Association from the appellants' seizure, and prevented its confiscation and destruction. The Shareholders Committee and the Association steadfastly refused to either permit appellants to fix the plaintiffs' attorneys' fees or to themselves fix such fees and be subject to coercion by appellants in so doing.

The matter of attorneys' fees was again submitted to the District Court by motions for allowances of such fees. [R. 6527-6528.] Complete notice to all parties concerned was given. [R. 6528-6533.] Appellants, fearful that the District Court might assess some of these fees against them, insisted upon a stipulation that only one-third of whatever award the District Court made, could be

paid, and that the other two-thirds must be stayed by the District Court, pending completion of settlement or further order of the Court. [R. 6381-6390.]

The attorneys in an effort to facilitate settlement, agreed that the fees which they had earned for services successfully rendered, might be withheld by the District Court. The District Court conducted hearings extending over several days and continuances, heard the testimony of experts, leaders of the bar, including a former State Supreme Court Justice and made its total award of \$540,000.00 to four separate firms of attorneys representing different groups of parties. Appellants immediately objected to the court's determination and threatened to wreck and repudiate the settlement, already agreed upon, unless the attorneys who had successfully sued the appellants, would immediately consent to a vacating and setting aside of the entire award of the Court, and that they be paid nothing for their nearly two years of successful litigation against the appellants. [R. 6381-6390, 6527-6566, 10703-10754.]

Peyton Ford, the Assistant to the then Attorney General of the United States, pledged the word of the Attorney General that settlement negotiations would go forward in good faith [R. 10734], if the attorneys would consent to taking part only of their fees now, and that the balance ($\frac{2}{3}$) might be determined in adversary proceedings either at the conclusion of settlement, or if no settlement resulted, in litigation. [R. 10709-10754.]

This was contained in a letter filed with the Court by Peyton Ford. [R. 6562-6564.]

Again the attorneys, who had recovered the Association from the appellants' seizure and had prevented its confiscation and destruction, acquiesced. There was paid \$163,-

000.00 on account of attorneys' fees, and the balance of the award was vacated by the District Court on consent of the counsel in whose favor the award had been made. [R. 6527-6550.] In so doing the attorneys relied on the assurances of the Attorney General of the United States, through his Special Assistant, Peyton Ford, that the case would thereby be settled and that the District Court would determine in adversary proceedings, not only the amount of fees to be paid to the successful attorneys, but who among the parties, including appellants, should be liable for the payment of such fees. Appellants expressly waived their right of appeal from the order thus paying an additional \$163,000.00. There has thus been paid with the express consent of appellants by waiver of right of appeal or by dismissal of appeal, a total of \$213,000.00 on account of attorneys' fees and approximately \$50,000.00 on account of expenses, a grand total of \$263,000.00. [R. 6547-6550.]

Yet appellants maintain, at pages 64 and 65 of their opening brief in referring to attorneys' fees, "The appropriation or expenditure of corporate funds to defend against such charges was plainly illegal and the Home Loan Bank Administration was authorized and indeed charged with the duty to prevent such disbursement." The \$263,000.00 paid on account completely justifies the necessity of the original appropriation of \$100,000.00 and the issuance of the cashiers' check of \$50,000.00.

In addition, the District Court has allowed to the Special Master, a total of \$60,000.00 on account of Special Masters Fees. [R. 3979-3982, 6420-6426, 8165-8169.] The special master is the former U. S. Attorney who represented appellants in the first twenty months of

the litigation. [R. 10325-10326.] He has ruled against appellants in various matters as Special Master. He also is now a defendant in the litigation. Appellants have appealed from the last two allowances of Special Master fees by the District Court and the Special Master, their own former attorney, is now litigating with his former clients in an effort to keep the fees he has been allowed by the District Court for services as Special Master. (Presently pending appeal No. 12575, taken May 3-5, 1950 and presently pending appeal taken about December, 1950.)

The power to regulate and supervise as claimed by appellants, apparently extends not only to the District Court and to judges and to the Special Master, but to any Court which rules against appellants.

An interesting commentary upon appellants' attitude on attorneys' fees is contained in their statement before the first Congressional Committee:

"Mr. Lee: . . . Now I do want to make clear that we never have questioned and never would question the withdrawal of a fair and reasonable amount, to challenge the authority of the Federal Home Loan Bank Administration. It has been done time and again and can always be done, but to spend hundreds of thousands of dollars out of these mutual institutions out there in this thing, we thought, is going too far." [R. 207.]

The attorneys for the Los Angeles Bank and its stockholders have represented their clients in this litigation for over four years. In April of 1950, the District Court made the first allowances on account of attorneys' fees to these attorneys. Appellants vigorously resisted and

again sought to supervise and regulate the amount of attorneys' fees that the Court could allow to the plaintiffs suing these appellants. (Reference is made to presently pending Appeal No. 12591, taken June 20, 1950.)

The District Court allowed \$75,000.00 on account, of four years of litigation, seeking the return of the \$46,000,000.00 of summarily seized and confiscated assets of the Los Angeles Bank. Yet appellants insisted before the District Court and before this Honorable Court of Appeals in September of 1950, that payment of any sum whatsoever must be stayed. (Reference is made to presently pending appeal No. 12591, taken June 20, 1950.)

On May 10, 1949, the attorneys for the plaintiffs and the Association, in the interest of settlement and to prevent repudiation of settlement, agreed upon and consented to the vacating of the Court's award of fees for their past services. [R. 6381-6390.] By September of 1949, nothing further towards settlement had been accomplished. The Home Loan Bank Board and the Attorney General's Office refused to agree to any terms, unless, notwithstanding their letter filed with the U. S. District Court, and their agreement and stipulation with all counsel that the Court should fix the fees, the Home Loan Bank Board itself, in direct violation of such agreements, could regulate and supervise the amount of attorneys' fees to be paid to the attorneys who had recovered the Long Beach Association from the appellants.

Disgusted with the lack of progress in months and years of settlement negotiations, the Wilmington Association, on September 1, 1949, moved the District Court for an order requiring all parties to report to the District Court on the progress of settlement negotiations and the

points of disagreement, if any. [R. 7193-7196, 8241-8242.] Instead of frankly and fairly reporting to the District Court that the Home Loan Bank Board was again repudiating its agreement that the Courts should determine fees, the Home Loan Bank Board on September 9th, adopted Resolution No. 2015. [Ftn. 11, R. 8242-8247.]

THE SECOND ATTEMPT TO SEIZE AND CONFISCATE THE LONG BEACH ASSOCIATION.

The motion for report on progress of settlement negotiation was set for hearing on September 12, 1949, before the District Court. [R. 7191-7192.] During the progress of the hearing on that motion, counsel for appellants attempted to read to the Court the text of Resolution No. 2015 requiring the Long Beach Association, "to show cause, if any it have, why the Home Loan Bank Board should not, for the reasons hereinbefore stated, enter its order or orders for such action as it deems necessary or appropriate, including the appointment of the Federal Savings and Loan Insurance Corporation as receiver for said Association." [R. 10787-10798.]

By appellants' regulations, Federal Savings and Loan Insurance Corporation is appointed as receiver only for the purposes of liquidation of the Association. (Title 24, C. F. R., Part 148, Section 148.1(10).)

At later hearings, appellants in responses to the Court's order, reported that no settlement of the litigation was possible, that no settlement had ever been agreed to by them. This of course, is in direct contradiction and conflict with the word of the Attorney General pledged to the Court and counsel when the attorneys who had successfully recovered the Association, consented to the Court

vacating the attorneys' fees awarded them by the Court for such recovery. [R. 7335-7339, 10798-10813.]

Order 2015 contains four grounds or charges upon which the Association was to show cause before Appellants Divers, Adams and LaRoque, why said appellants should not appoint themselves, as trustees of the Federal Savings and Loan Insurance Corporation, as receivers for the liquidation of the Long Beach Association. [Ftn. 11, R. 8242-8247.]

The first of these grounds is that the Long Beach Association "has failed to file the monthly and annual reports required by the Rules and Regulations for the Federal Savings and Loan System;"

Appellant Ammann has not yet completed his accounting to the District Court, and until such accounting is approved by the Court, no reports by the Association were possible. [R. 8277.]

The form of report required a certification under oath by the responsible officers of the Association, that the books and records of the Association, including those kept by appellant Ammann, were true and correct. [R. 8278-8280.]

In their opening brief, appellants on page 112, state glibly that any sort of exception or reservation could have been incorporated in the reports and that the Association should have filed the reports with such exception. This brings us to Ground No. 2 of Order 2015, which is "Said Association has failed and refused to furnish an affidavit of its president or secretary or other officer that, to the best of his knowledge and belief, the books of said Association correctly reflect the financial condition thereof, as required of all Federal savings and loan associations;"

Said Association had furnished such an affidavit to the examiner for appellants approximately three weeks prior to the adoption of Order 2015. The Association had a receipt in the personal handwriting of the chief examiner for such affidavit. [Ftn. 3, R. 8212, 8279-8280.] Notwithstanding this, the Chief Examiner testified at the hearing, that no such receipt had been given by him. [R. 10941-10942.]

The affidavit furnished by the Association contained the exceptions and reservations that the Association only guaranteed the accuracy of the books kept by itself, and that pending the decision of the litigation and the approval of appellant Ammann's accounting by the District Court, no complete financial statement could be made. [Ftn. 3, 11-7-49 No. 2, R. 8210-8211, 8279-8280.]

Notwithstanding the giving of the affidavit with the qualifications, appellants assert that no affidavit was given and therefore a receiver should be appointed for the liquidation of the Association.

Ground No. 3 of appellants' Order No. 2015, states that "Said Association has failed to pay the premiums for insurance of its accounts and the installments thereon due and payable on or about June 5, 1948, December 5, 1948 and June 5, 1949, in the total amount of \$36,487.25, in violation and disregard of the statutes of the United States, the Rules and Regulations for Insurance of Accounts, and its contract with the Federal Savings and Loan Insurance Corporation;".

At the time that this ground for receivership, seizure and liquidation, of the Association was adopted by appellants, the total sum of \$36,487.25 was on deposit in the

Registry of the District Court, in proceedings of which appellants had notice and in which they participated. Their objections and resistance to the deposit in Court of the \$36,487.25 were overruled and disallowed by the District Court. Appellants took no appeal from the order of deposit, but instead sought to appoint themselves receivers for the liquidation of the Association because of non-payment to them of money paid into the U. S. District Court Registry in interpleader, under order of the Court. [R. 8266.]

The Court at the time it allowed the deposit into the Registry of the Court, asked attorneys for plaintiffs if they felt the need of any injunction. Settlement negotiations were yet in progress and attorneys for plaintiffs told the Court they felt no necessity for an injunction at that time. [R. 10773.]

The preliminary injunction attacked on this appeal is to prevent the confiscation and liquidation of the Association because it doesn't pay for the second time to appellants, money it has already paid into the registry of the District Court under an order of the District Court against appellants, which has become final for lack of appeal therefrom.²

²The U. S. Supreme Court in *Dugas v. American Surety*, 200 U. S. 414, 81 L. Ed. 727 (1936), in describing a payment into Court similar to that made by the Association in this appeal, said:

"3. In the interpleader suit there was an actual, complete and judicially sanctioned payment. . . . While the payment was into the court's registry, and not directly to the claimants, it nevertheless was a lawful and effective payment under the Interpleader Act. In effect the first decree converted the claims . . . into claims against the fund paid into the registry; . . ."

Ground No. 4 of 2015 is an attempt to revive in September, 1949, “More Definite Statement” submitted to the said Association on May 29, 1946, the issues of which have been pending before the District Court since the commencement of this litigation in 1946. Part or all of these issues were determined by the final judgment of the District Court of January 23, 1948, removing appellant Ammann as conservator and requiring him to account to the Court. [R. 8264-8267.]

Everyone of the four grounds of order 2015 directly affects matters pending in issue before the District Court.

Since the commencement of the litigation appellants and various others of the defendants have made repeated and persistent efforts to prevent adjudication on the merits by the District Court. Their efforts have fallen into several groups:

(1) To conduct administrative hearings before themselves and decide the litigation for themselves.

(2) To compromise or settle the litigation, or to pretend to be willing to settle the litigation to prevent decision by the District Court on the merits.

(3) To file diversionary and multifarious litigation in other Courts to obstruct and delay the process of a decision on the merits before the District Court.

(4) To, by continual and repeated objections to the jurisdiction of the District Court, prevent a decision on the merits.

It is significant that of the fifteen proceedings listed in the description of the litigation at the opening of this brief, but two were commenced by plaintiffs and appellees.

Of the ten appeals and writs, all have been taken by appellants. All of the three writs have been decided against appellants. Two of the prior appeals have been dismissed by appellants before a decision on the merits could be achieved. Of the four pending appeals now before this Court of Appeals, three attack the power of the District Court to allow fees to its own Special Master, or to counsel for a Shareholders Committee.

STATUS OF THE LITIGATION AT THE TIME OF ISSUANCE OF INJUNCTION APPEALED FROM.

The injunction appealed from was issued November 7, 1949, about 3½ years after the first seizure. [R. 8149.] In that 3½ year interval, the following events had taken place:

(1) The one-man commissioner appellant Fahey had been abolished and replaced with a three-man bi-partisan Home Loan Bank Board, which had vacated orders for administrative hearings, declined to decide and hear the litigation before itself and had submitted by general appearance, before the District Court for decision on the merits. [Ftn. 7, R. 8231-8232.]

(2) The seized Long Beach Association had been restored to its founding management. Appellant Ammann had been removed as conservator and ordered to account for his twenty months dealings with the \$26,000,000.00 which he seized, without issuing any receipt therefor. The order of Court removing him as conservator and requiring him to account was a year and a half old, and was final from lack of appeal. [R. 8310-8328.]

(3) Appellant San Francisco Bank had in compliance with an order of the District Court, deposited \$14,000,-

000.00 of notes, securities, government bonds, trust deeds, etc., into the Registry of the Court, which appellants now claim is without jurisdiction. [R. 8399-8525.]

(4) The District Court had, by preliminary injunction, enjoined the prosecution of other actions by the same litigants, one in the Northern District California Court at San Francisco [R. 8362-8375], and the other in the State of California Superior Court in Los Angeles County. [R. 8377-8398.] These injunctions were dated July 30, 1948 and February 2, 1949. Both these preliminary injunctions had become final from lack of appeal. [R. 8274-8276.] The District Court had quieted title (at first by fifty separate intervention proceedings and finally by the mass interpleader of \$14,000,000.00) to almost all of the homes of the 8,000 borrowers from the Association. Since March of 1948, there had been no difficulties with homeowners' titles, cleared by order of court.

(5) The Association, in the spring of 1949, had made Federal Savings and Loan Insurance Corporation and Home Indemnity Company (the surety company on conservator Amman's \$100,000.00 bond), defendants in the litigation in order to prevent the statute of limitations affecting the obligations of these defendants, during the pending settlement negotiations. [R. 6736-6790.]

(6) Settlement negotiations had been in progress for more than a year and a half and all parties had considered the litigation as compromised. [R. 8239-8242, 8258.]

(7) The Association, under its founding management, had resumed growth and prosperity. The ten million dollar run of withdrawals, lost under conservator Ammann, had been regained.³ Of course, the Association was not

³See chart plate, page 4 hereof.

of the size and financial condition that it would have been, had it not suffered the \$10,000,000.00 run and twenty months of conservatorship with complete interruption of growth.

The Los Angeles Bank was to be restored by the compromise agreed upon by all parties.

(8) A motion was on file with the Court seeking an order of Court requiring all parties, including appellants, to report to the Court on the progress of settlement negotiations which had been proceeding for a year and a half. [R. 7141-7155.]

APPELLANTS' PURPOSES.

At this stage of the proceedings and just three days before the Court was to hear the motion for an order requiring report on settlement negotiations, appellants Home Loan Bank Board issued and caused to be served, their Order 2015, proposing to withdraw from the Court the issues as yet undecided by the Court, and to have an administrative hearing before themselves, to hear and decide such issues. [R. 8242-8247.]

The Association was to show cause why the appellants should not appoint themselves (in their *alter ego* capacities as Federal Savings and Loan Insurance Corporation), as receiver for the prosperous and growing Association for the purpose of liquidation of the Association.

The effect of any such order appointing a receiver, will of course be to vacate and nullify the final judgment of the District Court removing appellant Ammann as conservator and restoring the Association to its founding management. Such administrative hearing would require the parties who had submitted their issues to the Court to

withdraw such issues from the Court and submit them to one of the litigants; at a trial wherein that litigant, would act as judge to decide whether or not that litigant would nullify the previous Federal Court judgment.

Among the issues of the litigation are claims for damages aggregating approximately \$20,000,000.00 against appellant Federal Savings and Loan Insurance Corporation by the Association and its shareholders. [R. 4161-4332.]

The appointment of Federal Savings and Loan Insurance Corporation as receiver for the Association would mean that one of the defendants in the damage claims, was receiver for the plaintiff upon such damage claims, and would dismiss or terminate such litigation against itself, or would determine what, if any, of the claims for damages should be submitted to the Courts for decision.

For the supervisory authorities to adopt a policy of appointing themselves receiver to conduct litigation of claims for damages against themselves, is a procedure somewhat unique, even as far as administrative agencies have gone in the last few years. It would shock the conscience of any equity Court to appoint the defendant as receiver for the plaintiffs to conduct both sides of the \$20,000,000.00 damage claims litigation. Appellants therefore found it necessary to attempt such appointment themselves.

Among the incidental duties which Federal Savings and Loan Insurance Corporation would exercise as such receiver is:

(a) The continued employment or the discharge of the attorneys who previously had successfully recovered the Association from the confiscation by appellant Ammann and his purported conservatorship;

(b) The approval or continued objections to the accounting of appellant Ammann for his twenty months dealing with the seized \$26,000,000.00. The Association and its shareholders' preliminary objections to such accounting had been sustained by the District Court and appellant Ammann for most of the year 1950, has been attempting to amend his accounting [R. 8987-8996];

(c) Whether or not to deliberately provoke another run of withdrawals to assist the liquidation of the Association, which was the only purpose for which Federal Savings and Loan Insurance Corporation would be appointed as receiver. (Title 24, C. F. R., Part 148, Secs. 148.1(10).)

Liquidation of the Association could of course be greatly accelerated by rapid withdrawal of all savings deposits. The disposal of the \$1,300,000.00 surplus remaining after such run of withdrawals, and which would remain in the hands of appellants Divers, Adams and LaRoque, their *alter ego* Federal Savings and Loan Insurance Corporation, is an interesting speculation. It perhaps sharpens their argument that the District Court has no jurisdiction, because until they could withdraw the \$14,000,000.00 in the Registry of the District Court they could not themselves dispose of that sum of money or of the \$1,300,000.00 surplus.

The grounds alleged as the basis for the appointment by one litigant of himself as receiver for his adversary, are obviously sham and frivolous. The payment of \$36,487.25 into the Registry of the Court, instead of to one of several conflicting claimants, the giving of an affidavit with the qualification as to the pendency of this mass of litigation, the inability to give financial statements pending the approval of the accounting of the removed conservator, would hardly seem to justify the summary liquidation of a solvent prosperous and growing savings institution, particularly in view of the fact that the management of the institution, when restored by order of the Federal Court, had posted a \$1,000,000.00 surety bond with the Court to guarantee faithful performance of all management duties.

The fact that the previous conservatorship allegations were all likewise bonded by a \$200,000.00 surety bond, upon which no recourse had ever been sought by appellants during the 5 years of litigation, likewise demonstrates the good or bad faith of their 1946 charges of mismanagement and misappropriation. [R. 3226.] If genuine protection of the Association and its shareholders was their intention, recourse to surety bonds guaranteeing and indemnifying against the very charges put forth, should have been the very first steps of any one acting in good faith.

Appellants' purposes were alleged in the motions for the injunction as the deliberate ruin of the solvent, prosperous and growing Association. [R. 7843-7895.] These

allegations were verified. It was alleged that appellants intended to provoke another \$10,000,000.00 (or greater) run of withdrawals. That they intended to again tangle the homeowners' titles as they had been tangled in the twenty months previous conservatorship. That they intended to take charge of the damage litigation against themselves and dismiss or delay it to the damage of the shareholders.

It is significant that not one of these allegations made under oath, has ever been denied by appellants.

The hearing for the injunction proceeded with appellants in default to these allegations. Their only defense to the Court's issuance of an injunction to prevent these grave and irreparable damages and detriments was that the District Court was powerless to prevent them carrying out their alleged intentions which for the purposes of the injunction hearings, they admitted to the District Court.

In view of these circumstances there can be no surprise at what the District Court did. It issued its preliminary injunction to preserve the *status quo*, pending its trial on the merits of the issues submitted to the District Court for decision by both appellants and appellees. It could have done nothing else and preserved any respect for the judicial process in free America. If a judgment of a Federal Court, final from lack of appeal for 1½ years, is to be nullified and vacated by the losing litigant at any time, at that litigants' will, the judicial branch of our Government has been abolished.

PURPOSES OF INJUNCTION.

The preliminary injunction appealed from is only a PRELIMINARY Injunction. It merely stays the destructive hand of appellants from their second venture into ruin and seizure of a solvent growing and prosperous savings institution, until such time as the District Court can adjudicate the merits. The PRELIMINARY Injunction prevents appellants by their own hearing, seizing control of the entire litigation. Had the injunction not issued, within a course of days or at the most, weeks, appellants would have presented themselves to the District Court as both plaintiffs and defendants, they then could themselves have dismissed the litigation which for five years they have been unable to force the Court to dismiss.

Because this is class litigation, appellants would have had to apply to the District Court for approval or dismissal of such litigation, but whether dismissed or left pending, with appellants as both plaintiffs and defendants, in charge of the Association and its books and records, and in control of the litigation, there can be no doubt what would have happened to the \$20,000,000.00 damage claims against appellants. The preliminary injunction was to prevent appellants in their guise as receiver for the Long Beach Association from withdrawing the \$14,000,000.00 from the Registry of the Court, which the Court had by previous orders (final for 1½ years for lack of appeal), required to be deposited pending the Court's adjudication of the conflicting claims to those assets. [R. 8399-8525.]

In order to reverse this preliminary injunction, this Honorable Court of Appeals must hold either:

(a) That the District Court abused its discretion in preventing, pending its own decision, the matters above outlined; or (b) That notwithstanding a general appearance before the District Court by appellants, which has resulted in a final judgment affecting title and possession to \$26,000,000.00 in local assets, situated within the District of the Court and notwithstanding the deposit of \$14,000,000.00 of assets in the Registry of the Court, that the District Court is completely without jurisdiction to decide any issue of this litigation. It is not necessary that every pleading and every paragraph of the thousands of pages of such in this voluminous record be scrutinized by this Court of Appeals.

If there is a single issue made by any party properly before the District Court, the preliminary injunction to restrain appellants pending decision of that issue by the Court, was proper and must be affirmed.

The reluctance of Government officials claiming to exercise the supervisory authority of the United States, to submit the justice of their claims to an impartial Federal Court for decision requires explanation. The First Congressional Investigating Committee unqualifiedly condemned the former seizures and confiscations. [R. 9107-9191.] The United States Supreme Court, on appellants' first appeal, remanded the case to the District Court for a trial on the merits. [R. 2302-2304.]

Once the Shareholders Committee was financed for such a trial, appellants, rather than face the issues, returned the seized institution and ordered an accounting. When appellants decided to repudiate their settlement promises, they did so by their order seeking to bring the litigation before themselves for decision. The Congressional Committee had ruled against them. The Courts have ruled against them.

The issues of this appeal are simple. Can they try their own litigation before themselves, to the exclusion of the Federal Courts, created by the United States Congress, or must they, like any other litigant, submit to an impartial tribunal for a fair decision on the merits?

If the injunction is vacated and the District Court held without jurisdiction, the repetition of the run of withdrawals, the tangled titles, for the borrowers and the homeowners, and the destruction of the Association, will be immediate. Appellants admit their intention to do just these things. Are they to be prevented by affirmance of the injunction, or are they to be turned free to pursue for the second time, their unrestrained course of ruin and destruction?

Even this long statement of the case is but a summarization for the purposes of this appeal from a PRELIMINARY Injunction. A full statement of all occurrences in this litigation would unduly lengthen an already long brief. Only a minor part of the record is represented in the 24 volumes and nearly 11,000 printed pages of record on this one out of appellants' four appeals, now pending before this Court of Appeals.

QUESTIONS PRESENTED.

THIS APPELLEE DISAGREES WITH THE STATEMENT OF QUESTIONS PRESENTED SET FORTH IN APPELLANTS' OPENING BRIEF, PAGES 21 TO 22, AND CONSIDERS THE QUESTIONS DECISIVE OF THIS APPEAL TO BE:

1. WHETHER APPELLANTS CAN ATTACK THE JURISDICTION OF THE COURT BELOW SEVERAL YEARS AFTER JUDGMENTS EXPRESSLY DETERMINING "THAT THE COURT HAS JURISDICTION OF THE PARTIES AND SUBJECT MATTER INVOLVED" HAVE BECOME FINAL BY DISMISSAL OF THEIR APPEALS THEREFROM.

2. WHETHER APPELLANTS CAN BY PURPORTED "ADMINISTRATIVE HEARINGS" VACATE AND NULLIFY JUDGMENTS OF THE FEDERAL COURT AGAINST THEM, FINAL FOR YEARS FROM LACK OF APPEAL THEREFROM.

3. WHETHER APPELLANTS CAN ORDER APPELLEES "TO SHOW CAUSE" WHY APPELLANTS SHOULD NOT, AT "ADMINISTRATIVE HEARINGS" BEFORE THEMSELVES, NULLIFY AND VACATE FINAL JUDGMENTS OF THE FEDERAL COURT TAKEN AGAINST APPELLANTS UPON THEIR GENERAL APPEARANCE AND CONFESSION OF JUDGMENT.

4. WHETHER APPELLANTS CAN ABANDON THEIR ADMINISTRATIVE HEARING IN DECEMBER OF 1947, MAKE A GENERAL APPEARANCE BEFORE THE COURT BELOW AND CONFESS JUDGMENT IN FAVOR OF APPELLEES AND A YEAR AND A HALF AFTER SUCH JUDGMENT BECOMES FINAL CONDUCT AN ADMINISTRATIVE HEARING TO VACATE SUCH FINAL JUDGMENT.

5. WHETHER APPELLANTS CAN WITHDRAW FROM THE COURT BELOW ISSUES PENDING IN LITIGATION BEFORE SUCH COURT FOR THREE AND ONE-HALF YEARS, AND DECIDE SUCH ISSUES BEFORE THEMSELVES AT THEIR SO-CALLED "ADMINISTRATIVE HEARING."

6. WHETHER JUDGMENTS OF THE COURT BELOW QUIETING TITLE TO REAL AND PERSONAL PROPERTY PHYSICALLY WITHIN THE TERRITORY OF THE DISTRICT

OF SAID COURT AND PHYSICALLY IN THE REGISTRY OF SAID COURT CAN BE NULLIFIED AND VACATED WITHOUT THE CONSENT OF ANY COURT, BY APPELLANTS AGAINST WHOM SUCH JUDGMENTS WERE ENTERED.

7. WHETHER APPELLANTS' MALICIOUS, FRAUDULENT AND UNJUSTIFIED SEIZURES AND LIQUIDATION OF THE SOLVENT GROWING \$46,000,000.00 LOS ANGELES BANK AND \$26,000,000.00 LONG BEACH ASSOCIATION CAN BE REVIEWED OR CORRECTED BY ANY COURT.

8. WHETHER APPELLANTS CAN APPOINT THEMSELVES AS RECEIVERS FOR PLAINTIFFS, THEREBY OBTAIN CONTROL OF PLAINTIFFS' DAMAGE CLAIMS AGAINST APPELLANTS FOR \$20,000,000.00 AND DISMISS SUCH CLAIMS WITHOUT PAYMENT.

9. WHETHER APPELLANTS CAN BY "ADMINISTRATIVE HEARINGS" APPOINT THEMSELVES AS RECEIVERS FOR THE LIQUIDATION OF A SOLVENT, GROWING AND PROSPEROUS FEDERAL SAVINGS AND LOAN ASSOCIATION.

10. WHETHER ON AN APPEAL FROM A PRELIMINARY INJUNCTION BEFORE COMPLETE TRIAL ON THE MERITS APPELLANTS CAN ATTACK, AND SEEK TO REVERSE, EARLIER FINAL JUDGMENTS OF THE COURT BELOW.

11. WHETHER THE COURT BELOW ABUSED ITS DISCRETION IN GRANTING A PRELIMINARY INJUNCTION TO PREVENT APPELLANTS INTERFERING WITH ITS JURISDICTION AND FINAL JUDGMENTS BY REQUIRING APPELLEES TO APPEAR BEFORE APPELLANTS AT HEARINGS TO SHOW CAUSE WHY APPELLANTS THEMSELVES SHOULD NOT VACATE THE FINAL JUDGMENTS OF THE FEDERAL COURT AGAINST APPELLANTS AND IN FAVOR OF APPELLEES.

12. WHETHER THE COURT BELOW ABUSED ITS DISCRETION IN GRANTING A PRELIMINARY INJUNCTION TO PREVENT APPELLANTS FROM DELIBERATELY PROVOKING A SECOND \$10,000,000.00 RUN OF WITHDRAWALS OF DEPOSITS FROM APPELLEE ASSOCIATION AND ANOTHER PROTRACTED PERIOD OF TANGLED TITLES FOR THE HOMES OF 8,000 BORROWERS FROM APPELLEE ASSOCIATION.

SUMMARY OF ARGUMENT.

The preliminary injunction, the subject of this appeal, can be affirmed without detailed analysis or consideration of the 25,000 page record on appeal, or the 11,000 page printed record. The only proper subjects of inquiry are:

(1) Did the Court below abuse its discretion in granting the preliminary injunction and

(2) Was there any grounds stated for any relief in any of the multitude of pleadings?

No abuse of discretion has even been urged by appellants in their opening brief. Pleadings stating claims for relief have already been the subject of final judgments by the court below, the protection of which final judgments was one of the grounds for issuance of the Preliminary Injunction. The Preliminary Injunction should be affirmed on these grounds alone without further inquiry.

Appellants devote the major portion of their opening brief to an attack on the jurisdiction of the court below. On this appeal from a preliminary injunction, jurisdiction sufficient to justify such injunction is all that need be found. Inquiry into the Court's jurisdiction to grant every prayer for relief contained in all the pleadings is proper only on appeal from a final judgment.

The Court has jurisdiction over appellants on many grounds. Among them are:

A. The general appearance made by appellants by formal resolution certified to under appellants' seal and filed with the Court below as required by the express terms of such resolution.

By appellants seeking and receiving affirmative relief from the Court below. Such relief consisted of:

(1) A special election of directors of appellee Long Beach Association, conducted by the Court's special master (appellants' former attorney in the litigation), at the express request of appellants made to the Court below.

(2) The filing of a \$1,000,000.00 bond by officers of appellee Long Beach Association with the Court below on order of the Court at the express request of appellants.

(3) Appellants also sought but did not receive an order of the Court below confirming and validating all acts of appellant Ammann as conservator.

B. The Court has jurisdiction over appellants served with Summons or other process, anywhere in the United States, such jurisdiction was under old Section 118, Title 29, New Section 1655, Title 28, U. S. C. A., which expressly provides for out of state service on absent defendant in actions to quiet title to, or recover possession of, real or personal property, situated within the territory of the District Court.

C. The Court had jurisdiction in interpleader over appellants by the express terms of old Section 41(26), Title 28, New Sections 1335, 1397 and 2361,—28 U. S. C. A. The Court below had nationwide jurisdiction and process both to enjoin and to summon defendants in any state, including the District of Columbia. The Court also had jurisdiction in interpleader over appellants under its general equity powers and under interpleader, pursuant to Rule 22, F. R. C. P.

D. The Court had jurisdiction over appellants by authority of its former final judgments made during the three and one-half years during which the litigation had

been pending, such final judgments expressly found the Court had jurisdiction “over the parties and subject matter involved,” writs and appeals taken against such judgments to the United States Supreme Court and to this Court of Appeals in 1946-1947-1948 were denied or dismissed. Appellants have failed to appeal from similar judgments, finding and exercising jurisdiction in the Court below. Such final judgments and orders are *res adjudicata* and law of the case on jurisdiction of the Court below.

E. The Court has jurisdiction over appellants, who are doing business in California, by the terms of Section 1391(c), New Title 28, U. S. C., which reads in part:

“A corporation may be sued in any judicial district in which it . . . is doing business and such judicial district shall be regarded as the residence of such corporation. . . .”

F. The Court had jurisdiction to hear the case on the merits to decide its jurisdiction,

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209
(U. S. Supreme Court, 1947),

and similar Supreme Court decisions hold that a Federal Court has jurisdiction to hear the merits when decision of the merits is decisive of the jurisdiction of the Court. An action against officers of the United States alleging wrong-doing, abuse of discretion and other torts is such an action.

Appellants are “sue or be sued” corporations, agents, conservators, receivers and agencies are not immune from suit as agencies or instrumentalities of the United States. The sue or be sued clause, express waiver of such immunity by Congress, in creating many of appellants, by necessary implication, extends to the entire statutory

scheme of home financing agencies for loans on real property and re-discounting of such loans.

Appellants' administrative orders under review in the court below are all reviewable, both by the express terms of the administrative procedure act and under the inherent powers of Federal Courts to enforce constitutional safeguards.

None of appellants are indispensable parties, nor are there any indispensable parties to these actions. There can be no indispensable parties to actions *in rem* to recover possession of, and quiet title to, real and personal property within the territorial jurisdiction of the Court hearing such action.

All of the 84 findings in the Preliminary Injunction appealed from, as well as the many other findings in the prior final judgments of the court below, are conclusive and unassailable upon this appeal. Appellants have failed to print the entire record of proceedings in the court below and have likewise failed to point out in their briefs any absence of evidence or anything other than conflict of evidence. The court below heard the personal testimony and cross-examination of witnesses, who testified in many of the 100 hearings during the three and one-half years of the litigation prior to the preliminary injunction.

The preliminary injunction was proper as "necessary and appropriate process" authorized by the express terms of the administrative procedure act to preserve status and rights pending conclusion of review proceedings pending before the court below.

The preliminary injunction was also required to prevent interference with the jurisdiction of the court below and prevent violation of its previous final judgments.

The preliminary injunction was also essential to prevent appellants appointing themselves as plaintiffs in litigation in which they are already defendants and thereby under the guise as acting as receivers obtain control and direction of litigation in which appellants are defendants.

The preliminary injunction was appropriate to prevent wasteful and costly multiplicity and duplication of actions and proceedings. Proceedings in the Court below against appellants had already been the subject of expenditure of approximately \$500,000.00 in attorneys' fees, special master fees, Court costs, and other expenses of litigation. Appellants sought to require a duplication of such proceedings before themselves in Washington, D. C., 3,000 miles from where the litigation has been pending at Los Angeles, for almost five years.

The injunction was necessary to prevent appellants deliberately causing irreparable injury including but not limited to, another \$10,000,000.00 run of withdrawals from appellee Long Beach Association, and another period of several years of tangled titles for the 8,000 homeowners, borrowers from appellee Long Beach Association. Such irreparable injury was threatened by appellants as coercion to compel appellees to abandon prosecution of \$20,000,000.00 damage claims in this litigation against appellants.

The preliminary injunction appealed from should be affirmed as within the discretion of the Court below which had jurisdiction to issue such injunction on a multitude of grounds, the shortest and simplest of which was to protect the integrity of its final judgments entered against appellants in the three and one-half years of this litigation previous to such preliminary injunction.

I.

SCOPE OF REVIEW ON APPEAL FROM
PRELIMINARY INJUNCTION.

Appellants treat these appeals as reviewing everything done by the Court below in the nearly five years that this litigation has been pending. (App. Op. Br. pp. I to III.) Such is not the review accorded by an appeal from a Preliminary Injunction. On such an appeal, this Honorable Court of Appeals need determine but two things:

(1) was the preliminary injunction an abuse of discretion by the Court below; and

(2) were there any allegations entitling plaintiffs to some relief.

It is wholly unnecessary for this Honorable Court of Appeals to comb through the 25,000 page record (or even this 11,000 page printed record) and test the sufficiency of every allegation of the multitude of pleadings. At the moment the reviewing Court finds a single pleading, or allegation entitling the plaintiffs to a trial on the merits, a Preliminary Injunction preserving the *status quo* pending such a trial, can be affirmed.

Since this litigation commenced in 1946, appellants have allowed to become final, many prior appealable orders which they could have reviewed had they so desired. [R. 8310, 8399, 8526, 8362, 8377. NOTE: R. 8288-8292 lists fifty such orders.] The sufficiency of the pleadings, the jurisdiction of the Court below, and the correctness of the final judgments made in earlier years, are not now made reviewable because appellants have deliberately provoked another preliminary injunction. They cannot thereby ob-

tain a review of judgments which have been final for two, three or four years; nor can they, by these appeals, as they have been so desperately striving to do for nearly five years, prevent a trial on the merits before the Court below and a full inquiry into these unjustifiable confiscations.

The U. S. Supreme Court has repeatedly held that an appeal from a preliminary injunction does not cast upon the reviewing Court, the burden of inquiring into the whole prior record; nor does it compel the reviewing Court to review all pleadings and rulings of the Court below. A leading case on this point is:

Deckert v. Independence Shares Corp., 311 U. S. 282, 85 L. Ed. 189 (1940).

Appeal from Preliminary Injunction restraining trustee from dissipation of assets. Plaintiff's complaint prayed for accounting, receiver, injunction rescission, etc. The District Court denied motions to dismiss, granted a preliminary injunction, and took under submission, the question of the appointment of a receiver. The District Court also appointed a Special Master to ascertain complicated issues *re* insolvency.

Defendants appealed from the preliminary injunction. The Circuit Court attempted to determine the scope of the action before the District Court, reversed the preliminary injunction and directed amendment of the complaints in the District Court.

The U. S. Supreme Court reversed the action of the Court of Appeals, affirmed the District Court in granting the preliminary injunction and held that all the incidental

matters of the litigation should not be settled upon the appeal from a preliminary injunction. The Supreme Court said:

“It is enough at this time to determine that the bill contains allegations which, if proved, entitle petitioners to some equitable relief. WHETHER OR NOT THEY SUFFICIENTLY ALLEGE or prove THEIR RIGHT TO ALL OF THE RELIEF PRAYED in the bill we do not decide BECAUSE THE QUESTION IS NOT BEFORE US. Hence, if the District Court had jurisdiction it was proper to consider whether injunctive relief should be given in aid of the recovery sought by the bill . . .

“We hold that the injunction was a reasonable measure to preserve the *status quo* pending final determination of the questions raised by the bill. ‘It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, UPON APPEAL, AN ORDER GRANTING SUCH AN INJUNCTION WILL NOT BE DISTURBED UNLESS contrary to some rule of equity, or THE RESULT OF IMPROVIDENT EXERCISE OF JUDICIAL DISCRETION.’ (Citing authorities.) . . .

“In view of this we cannot say that the trial judge abused his discretion in granting the temporary injunction.

“We conclude that the orders granting the temporary injunction and denying the motions to dismiss were correct and should have been sustained. The orders allowing the addition of two plaintiffs and referring the issue of insolvency to a master were interlocutory and not appealable (28 U.S.C.A., Sec. 225), and should have been reversed only if peti-

tioners were not entitled to any equitable relief. (Citing authorities.) The Circuit Court of Appeals properly did not consider them on the merits, and if ultimately there is an appeal from a final decree the correctness of these orders may be examined.

“The decision of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

“Reversed and remanded.” (Emphasis added.)

Another case where decision of the merits on an appeal from a Preliminary Injunction was held improper, is:

Rogers v. Hill, 77 L. Ed. 1385, 289 U. S. 582,
U. S. Supreme Court, 1933.

Plaintiffs sued for recovery of payments they claim were illegally made and to enjoin additional payments of the same nature. A Preliminary Injunction is granted by the District Court. Defendants appealed. On the first appeal, C. C. A. reversed the interlocutory injunction and in its opinion discussed matters going to the merits of the case.

Upon the remand to the District Court, it vacated the Preliminary Injunction and dismissed the complaint on the merits.

Plaintiffs again appealed and C. C. A. affirmed the dismissal. The U. S. Supreme Court reversed and held:

(1) That an appeal from a temporary injunction did not decide the merits and therefore a reversal of such injunction did not decide the merits.

(2) That the Court below yet had jurisdiction to permit amended or additional pleadings, vary or expand the issues, and take other proceedings.

The Supreme Court said:

“ . . . the Circuit Court of Appeals reversed the interlocutory order and directed that a mandate issue to the District Court ‘in accordance with this decree.’ The mandate directed further proceedings in accordance with ‘the decision.’ On the coming down of the mandate, the district court vacated the temporary injunction and dismissed the bills of complaint upon the merits. Plaintiff appealed, the Circuit Court of Appeals affirmed, citing its opinion on the former appeal, and this court granted . . . certiorari. . . .”

“We are of the opinion that the mandate did not direct dismissal. The granting of temporary injunction involved no determination of the merits. Such a decree will not be disturbed on appeal except for improvident allowance, violation of the rules of equity or ABUSE OF DISCRETION. (Citing authorities.) The opinion of the Circuit Court of Appeals did indeed deal with matters affecting the merits but the decree did not extend beyond mere reversal of the order from which the appeal was taken. . . .”

“Moreover, if the court intended to direct dismissal, it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose. But, assuming it included the opinion, THE MANDATE WOULD NOT PREVENT THE DISTRICT COURT in the exercise of a sound discretion FROM ALLOWING PLAINTIFF, WERE ADEQUATE SHOWING made, to FILE ADDITIONAL PLEADINGS, vary or EXPAND THE ISSUES and take other proceedings to enforce the accounting sought by his bills of complaint.” (Citing authorities.)

“ . . . The decree of the Circuit Court of Appeals is reversed, the decree of the district court dismissing the bills on the merits is vacated, and the case is remanded to the district court WITH DIRECTIONS TO REINSTATE ITS DECREE GRANTING INJUNCTION PENDENTE LITE and for further proceedings in conformity with this opinion.” (Emphasis added.)

Notwithstanding the reversal of an earlier temporary injunction, the U. S. Supreme Court on the second appeal, directed the District Court “to reinstate its decree granting injunction *pendente lite*.”

A Preliminary Injunction can be reversed only if the Court below has abused its discretion. In determining whether or not such discretion has been abused, the Court of Appeals can weigh the injury resulting from a denial, as against the inconvenience (if any) imposed by granting of such preliminary injunction. The Court below inquired as to the inconvenience resulting from the granting of the preliminary injunction and found [R. 8276]:

“63. That no harm, loss, injury or damage can result to the shareholders, stockholders, borrowers, defendants Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, the members or trustees thereof, the public interest, and any or all other defendants or parties to this litigation, from restraining said hearing and proceedings called by Home Loan Bank Board Order No. 2015, until such time as this Court can hear upon the merits, the issues pending herein awaiting trial, or until further Order of this Court.”

The Court below also found [R. 8233]:

“21. That as a requirement of the Order of this Court removing defendant Ammann as purported

conservator from the possession and control of the assets, business and affairs of said Long Beach Federal Savings and Loan Association, this Court ordered that a \$1,000,000.00 surety company bond be filed by the officers of said Association with this Court as security during the time they were in such possession and control of the assets, affairs and business of said Association, under said Order of this Court.

“The said bond remains on file with this Court in full force and effect. That neither defendants Home Loan Bank Board, *et al.*, or any other person whomsoever, has ever made application to this Court for any recourse on said bond or said Order of this Court, nor have they, nor has any one, made any charges of wrong-doing or misconduct on the part of said association, or its officers and directors, on which this Court could direct proceedings against said bond.”

The Court below further found [R. 8276]:

“64. That the only amounts of money disclosed in said Order No. 2015 in any of the four grounds or reasons therein contained is the said sum of \$36,487.25, which sum, in cash, is already on deposit in the Registry of this Court, in excess of, and above the amount of said \$1,000,000.00 surety company bond. That the deposit in Court of said \$36,487.25, of disputed insurance premiums by said Association, adequately protects the interest of said Federal Savings and Loan Insurance Corporation pending adjudication of the issues of this cause, and that said \$1,000,000.00 bond adequately protects said Association and its shareholders, borrowers and others doing business with it, pending the hearing by this Court on the merits of the issues pending herein awaiting trial.”

By these findings, the Court weighed the inconvenience resulting to appellants from such injunction and concluded that appellants were completely and adequately protected from any harm or injury which could result from a preliminary injunction to preserve the *status quo* pending trial on the issues of the merits by the Court below. The Court below said in the concluding paragraph of its Order [R. 8309]:

“In view of the fact that a bond in the sum of \$1,000,000.00 is now on deposit in this Court by the officers of said Association, the bond as security in accordance with the provisions of rule 65, subdivision (c) Federal Rules of Civil Procedure, is hereby fixed in the nominal sum of \$5,000.00.”

The Court weighed on the other hand the irreparable injuries threatened by appellants if the preliminary injunction appealed from were not granted. Finding No. 34 covers Record pages 8249 to 8256. Such finding skeletonized and summarized, is [R. 8249]:

“34. That the injuries threatened by the actions and proceedings hereby enjoined pending trial on the merits, or further order of this Court, are:

(a) Undermining of public confidence and faith in appellee Long Beach Association, taken from possession of appellants and given to appellee by prior order of the Court below.

(b) Causing fear in the depositors and thereby probably starting another run of withdrawals similar to, or greater than, the \$10,000,000.00 run of such withdrawals previously suffered when appellants first seized the association in 1946.

(c) Again clouding the titles to the homes of the 8,000 borrowers from said association, as such titles were previously clouded and rendered unmarketable during the first two years of the litigation.

(d) and (e) Orders by appellants inflicting penalties on appellees and thereby interfering with the process, orders and judgments of the Court below.

(f) and (g) Needless duplication and multiplicity of actions by requiring appellees to travel 3,000 miles to Washington, D. C., to duplicate the trial before the Court below. That such multiplicity of actions and duplication of trials violates Section 5(a) of Administrative Procedure Act, 5 U. S. C. 1004(a) as to convenience of parties and their representatives.

(h) Appellants would appoint themselves receivers for liquidation of appellee solvent Long Beach Savings and Loan Association. That for appellees to have complied with the requirements of said Order 2015 calling said hearing before appellants, would have waived the issues of this litigation in multi-million dollar amounts specified in twelve sub-paragraphs of said finding, the aggregate of such amounts totals in excess of \$40,000,000.00.

(i) That appellants attempted to compel appellees to either default the pending proceedings before the Court below or default appellants hearing (set before appellants by themselves), by deliberately timing appellants' hearings so as to conflict with Court hearings and thereby make impossible appellee's attendance on both hearings scheduled

almost simultaneously to be held at Los Angeles, California, and in Washington, D. C., 3,000 miles apart.

By these findings, the Court below determined that no harm would result to appellants by postponement of their own hearing before themselves and that grave and irreparable injury would be sustained by appellee unless such hearing were so postponed by this preliminary injunction.

This factual situation, appellants suffering no injury and adequately protected by a \$1,000,000.00 bond and appellees threatened with irreparable, immediate and grave injury and without any protection whatsoever, is almost identical with the case of:

Prendergast v. N. Y. Telephone Co., 262 U. S. 43,
67 L. Ed. 853-1923.

Appeal by Public Service Commission of the State of New York, from a preliminary injunction enjoining enforcement of rate reductions alleged by plaintiffs to be confiscatory.

The trial court enjoined enforcement of the orders pending trial on the merits and required a \$6,000,000.00 bonds to secure repayment, if the charges collected during the suit were found to be excessive. The suit was brought and the preliminary injunction issued prior to the final conclusion of the administrative hearing before the Public Service Commission. Appellants urged: that the enjoining Court lacked jurisdiction; that the pleadings were

insufficient; that the action was prematurely filed; and that injunction was granted upon insufficient evidence.

All of these contentions were overruled by the U. S. Supreme Court, which said:

“ . . . It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. (Citing authorities.) Especially will the granting of the temporary writ be upheld when the balance of injury as between the parties favors its issue. (Citing authorities.) Here the commission had prescribed temporary rates which were found to be confiscatory, which were to continue in effect pending the final determination of the commission after its investigation had been completed; and no date had been fixed for the completion of this investigation or the final hearing. The company, meanwhile, could only be protected from loss by injunction; while on the other hand, its subscribers were protected by the bond which was required for the return of the excess charges collected if the injunction should be thereafter dissolved. . . . ”

“And finding nothing in the record which justifies us in concluding that the District Court improvidently exercised its judicial discretion in granting the interlocutory injunction, its order is affirmed.” (Emphasis added.)

Appellants have never applied to the Court below for any relief on the million dollar bond, now on file with said Court for more than three years, nor have they claimed it was inadequate to protect them. [R. 8233-8235.]

A case wherein the Court of Appeals for the First Circuit reviewed many earlier United States Supreme Court decisions and refused, under the authority of such decisions, to review any issue other than abuse of discretion of the Court below in granting a preliminary injunction was:

Munoz v. Porto Rico Ry. Light & Power Co., 83 F. 2d 262; (C. C. A. 1-1936.)

Certiorari denied 298 U. S. 689; 80 L. Ed. 1408 (1936).

Appeal from preliminary injunction and from order refusing to dissolve preliminary injunction. The Circuit Court of Appeal for the First Circuit said at page 268:

“It is well established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised. * * * The duty of this court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits, but simply to determine whether the discretion of the court below has been abused.’ (Citing authorities.)

“The only question presented by the record upon this appeal is whether the District Court abused its

discretion in granting an injunction until the case could be heard upon the merits. * * * As no abuse of discretion is shown, the order must be affirmed.' (Citing authorities.)

"In *Ohio Oil Co. v. Conway*, 279 U. S. 813, 815, 49 S. Ct. 256, 73 L. Ed. 972, in a *per curiam* the Supreme Court laid down the rule:

" 'Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted. *Love v. Atchison, Topeka & Santa Fe R. Co.* (C. C. A.) 185 F. 321, 331, 332.'

"In *Love v. Atchison, Topeka & Santa Fe R. Co.* (C. C. A.) 185 F. 321, 331, cited in the above case, the court again stated the rule in such cases:

" 'An appeal from an order granting or refusing an interlocutory injunction does not invoke the judicial discretion of the appellate court. The question is not whether or not that court in the exercise of its discretion would make or would have made the order. It was to the discretion of the trial court, not to that of the appellate court, that the law intrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion?' (Emphasis added.) (Citing authorities.)

“ ‘The appellant sets out 10 assignments of error. They all go to the merits of the controversy, and could very properly be discussed if the case were here after a full hearing. But the question this court at this stage is called upon to decide is whether the court below, having the discretion to grant or refuse the temporary injunction, has in this instance abused its discretion.’

“The Supreme Court generally disposes of appeals from interlocutory orders granting temporary injunctions by affirming upon the authority of cases holding that the matter rests in the sound discretion of the trial court. (Citing authorities.)

“We are not satisfied that there was any abuse of judicial discretion by the District Judge in granting the temporary injunction . . . thereby preserving the *status quo* until a hearing on the merits. This is the only question before this court on this issue.”

“Where questions both of law and facts are involved and the trial court in its discretion has issued a temporary injunction to preserve the *status quo* until these questions can be presented on final hearing, this court on appeal will not undertake to find the facts or to lay down rulings on specific issues”

Appellants in their opening brief of 180 pages (including appendix) devote about four pages to the question of the preliminary injunction from which they appeal, and nowhere in those four pages do they suggest or discuss that it was an abuse of discretion by the Court below.
(App. Br., p. 108.)

It is therefore obvious that appellants have undertaken on this appeal to attack and review matters not reviewable on an appeal from an interlocutory injunction. The remaining 180 pages of appellants' brief (including appendix) asks this Court of Appeals to review, prior to final judgment, all of the previous rulings of the Court below and all of the pleadings, neither of which is a proper subject for review on this appeal.

Appellants devote the major portion of their brief to an attack upon the jurisdiction of the Court below.

We believe it proper that the jurisdiction of the Court to make the preliminary injunction should be demonstrated. But this does not necessitate inquiry into every relief sought in the mass of pleadings. These matters are reviewable ONLY ON APPEAL FROM A FINAL JUDGMENT.

Further the jurisdiction of the Court below to make the preliminary injunction is to be considered AS OF THE DATE OF THE PRELIMINARY INJUNCTION, not the date of commencement of the action. The question of affirmance or reversal of the preliminary injunction is to be considered in the light of circumstances existing at the time of DECISION OF THIS APPEAL.

The U. S. Supreme Court so held in the recent case of:

Chapman v. Sheridan-Wyoming Coal Company,
338 U. S. 621, 94 L. Ed. 393 (U. S. Supreme
Court—Feb. 1950).

Appeal from order dismissing action for an injunction. Review of injunction was based upon facts which occurred during the course of the litigation. Appellant insisted the action must be tested and the reversal of the injunction considered in the light of conditions existing at the commencement of the action.

The U. S. Supreme Court said, in equity: “. . . The question on injunction is whether the action threatened will be a violation if it now takes place. . . .”

“. . . Plaintiff insists that the Secretary is required to act in the light of conditions when Big Horn first applied, and not as of now when it has built up a going business on the inadequate state leases, aided by war conditions.

“But the action is one in equity, and ‘equity will administer such relief as the exigencies of the case demand at the close of the trial.’ (Citing authorities.) The question on injunction is whether the action threatened will be a violation if it now takes place in light of conditions shown by the proposed amended complaint. That pleads findings of the Department which show what has happened since the Big Horn application was filed. . . .” (Emphasis added.)

II.

THE COURT BELOW HAS JURISDICTION.

A. The Court has jurisdiction over appellants:

(1) Who made general appearances before the Court and applied for, and received affirmative relief from the Court below;

B. Under Section 118, Title 28, as it existed when the actions were filed in 1946, and as amended in 1948 into Section 1655, Title 28.

C. In interpleader:

(1) Under Section 41, Subdivision (26), Title 28, statutory interpleader as it existed in 1946, when the actions were commenced and the original interpleader filed, and as amended in new Title 28, Sections 1335, 1397 and 2361;

(2) Under inherent equity interpleader and bills in the nature of interpleader in federal courts generally;

(3) Interpleader under Rule 22 F. R. C. P.

D. By former judgments and orders, the Court has expressly and impliedly held that it has jurisdiction over appellants, and all other parties, and over the subject matter of the actions.

(1) Appellants have dismissed previous appeals from judgments containing the express findings that the Court has jurisdiction over the parties and the subject matter.

(2) Appellants have failed to appeal from judgments containing the express finding that the Court has jurisdiction over parties and the subject matter.

(3) In many orders and judgments, the Court has impliedly exercised jurisdiction over appellants and the subject matter.

(4) All of the foregoing judgments and orders (1) to (3) have become final, are *res adjudicata*, and the law of this case.

GENERAL APPEARANCE.

A. The Court has jurisdiction over appellants:

(1) Who made general appearances before the Court and applied for and received, affirmative relief from the Court below.

At the time the preliminary injunction was issued, appellants had by official resolution, under seal, made a general appearance and their counsel had sought and obtained affirmative relief from the Court below. [R. 8301-8302, 3404, 10303-10334.] In considering the many sources of the Court's jurisdiction, we shall therefore discuss such general appearance first among the many sources of the Court's jurisdiction.

Whatever may have been the prior situation in regard to immunity from suit, indispensable parties, lack of jurisdiction of the subject matter, non-reviewable orders, and the multitude of other pleas in abatement; on January 17 to 23, 1948, the Court below acquired jurisdiction in personam over all appellants. That jurisdiction was conferred by appellants' Order No. 388 [R. 3404], which confessed judgment as to many of the then pending issues of the litigation. The only parties who could be claimed to be indispensable, were appellant Home Loan Bank Board. Order No. 388 was a formal resolution unanimously adopted by all of the then members

of the said appellant board. A certified copy thereof under the seal of said appellant board was duly filed with the Court below. Such filing was expressly pursuant to the terms of such Order. [R. 3405.]

The events immediately preceding Resolution No. 388, emphasize even more vividly than the terms of the Resolution, the intent to submit to the Court all issues not abandoned by the confession of judgment.

At the commencement of the litigation, a year and a half previously, appellant Fahey had insisted upon being his own judge at an administrative hearing before himself. The hearing had been enjoined by the Court below and appeals from such injunctions had been heard before the U. S. Supreme Court, which remanded the case to the District Court for further proceedings, but dissolved the injunction against the administrative hearing.

By late December of 1947, appellant Fahey was no longer a public official. His one-man "Federal Home Loan Bank Administration" had been reorganized into the three-man "Home Loan Bank Board." The administrative hearing was re-set for December 15, 1947, at Los Angeles. The Shareholders Protective Committee protested the hearing before Fahey, Adams and Dyke, then members of the board, and defendants in this litigation, of the issues pending before the U. S. District Court for decision. [R. 2914.]

The Association amended its request for the administrative hearing. The amendment of the request for hearing urged a trial on the merits before the Court below, rather than one of the litigants conducting a hearing of his own case. The protests against the administrative hearing were heeded, and appellants Home Loan Bank Board postponed such hearing indefinitely.

Within one week of such postponement, appellant Fahey's term expired and the President failed to reappoint him as a board member. He was thereafter no longer a public official.

The litigation was then pending in the Court below for decision on the merits with the administrative hearing abandoned to facilitate such Court's decision.

On January 17, 1948, about one month after abandoning the administrative hearing, appellant Home Loan Bank Board, by adopting Order No. 388, unanimously voted to rescind the appointment of appellant Ammann as conservator, to remove him from possession of said Association, and required that he account with the shareholders and file such accounting with the Court below.

The case before the Court below was an action by the shareholders, referred to in such Order 388 (through their Protective Committee, plaintiffs herein) to obtain among other things, the exact relief confessed by Order No. 388, that is, the removal of Ammann as conservator, the return of the Association, and an accounting.

The requirement of Order No. 388 that "a copy of such accounting be filed with the District Court of the United States, in and for the Southern District of California" was a submission to the jurisdiction of the Court below, at least for the purposes of such accounting and its approval. However 388 went much further than an accounting. The last paragraph is:

"Be It Further Resolved that a certified copy of his resolution be forthwith delivered to the above-

named Court and to counsel for each of the parties of record in actions numbered 5254 P. H. and 5678 (WM) PH in said Court, except counsel for Intervenors in said actions, and that a copy be furnished to the Conservator.” [R. 3405.]

As a result of this clause of the order, a certified copy was filed with the Court below. A petition by the Shareholders, plaintiffs in the action, and named in the resolution as the persons with whom Ammann was to account and whose representatives were to receive upon demand the assets, books and records of the Association, was presented to the Court. A hearing was held before the Court below upon such petition. [R. 10303-10334.]

More than three years have elapsed since the preparation of this transcript during which time, appellants have made no objections to the correctness of the matters therein contained.

Two counsel appeared for appellants Home Loan Bank Board, Fahey, *et al.* One, Honorable James M. Carter, then U. S. Attorney, now a U. S. District Judge at Los Angeles. The other, William F. McKenna, described in the appearances as “Principal Attorney, Home Loan Bank Board, Attorney for Defendant Home Loan Bank Board.” [R. 10304.]

Nowhere throughout the 34 pages of transcript is there any reference to a special appearance.

The judgment, conceded by appellants at page 82 of their brief, to be a final judgment, was never the subject of an appeal, or even a motion to vacate or correct.

Appellants through their counsel Honorable James M. Carter and “Principal Attorney,” William F. McKenna,

objected strenuously, on the merits of interpretation of the resolution. They vehemently insisted that there must be a special election of directors of the appellee Association and read to the Court a telegram from appellants H. L. B. B. to that effect. [R. 10311-10317.]

The Court proceeded to grant in part the relief appellants thereby sought and ordered such an election under the supervision of the Court. Principal Attorney McKenna, appearing generally for appellants Home Loan Bank Board, et al., said:

“ . . . It is entirely satisfactory that the conduct of that election be under the order and direction of this Court.” [R. 10314.]

Upon such assurances, the Court did appoint its special master to conduct such election, and in making such appointment, Principal Attorney McKenna for appellants Home Loan Bank Board, *et al.*, stated to the Court as follows [R. 10326]:

“The Court: May I ask the United States Attorney, Mr. Carter, whether or not they consent to the appointment of Mr. Walker as Master?”

Mr. Carter: We will consent, on condition, of course, that he take a leave of absence from the Justice Department for that purpose.

The Court: Well, it contemplates, of course, that he would not be a United States Attorney. In other words, acting as Special Master he would be an arm of the Court and responsible to the Court.

Mr. McKenna: As a representative of the Board, do you wish to consent to his appointment?

Mr. McKenna: We do, sir.”

Not only did the United States Attorney for the District and the Principal Attorney for the appellant Home Loan Bank Board make a general appearance, but in addition, the United States Attorney, acting for appellants, asked the Court for affirmative relief, which was granted in part and denied in part [R. 10332]:

“Mr. Carter: . . . I wonder if it might be proper to suggest that there be included in the order some statement to the effect that the acts of Ammann during his occupancy be considered legal acts of a Conservator duly appointed,”

Appellants having asked the Court that “the acts of Ammann during his occupancy be considered legal acts of a Conservator duly appointed,” can hardly maintain the Court was without jurisdiction to make the order for which they applied.

The other affirmative relief requested by appellants and granted, was [R. 10333]:

“The Court: The order will provide further that upon the voluntary offer of the officers and directors of the Association and at the request of the United States Attorney, the officers shall file a bond upon the same terms and conditions as the bond usually required under the Federal Home Loan Act and the rules and regulations, and conditioned upon the same terms and conditions, and filed with the Home Loan Bank Board.

Mr. Carter: In the sum of?

The Court: In the sum of one million dollars, the bond to continue until the further order of the Court. The bond in that sum to remain in force and effect and continue until the further order of the Court. In other words, I suppose after you get all through

with the litigation you will want to draw the bond down, in which event you can come into the Court. Is there anything else now? Very well. When do you think that you will be able to get these orders formalized?"

one of the orders thus "formalized" appears at page 8310 to 8328 of the printed record, the other is Appendix Three hereof, p. 319. Clerk's Transcript, page 4712,⁴ reads as follows:

(Photostat)

The \$1,000,000.00 bond required by the order of the Court, at the request of the attorneys for appellants, appears at R. 3553. The photostatic copy in the record bears the personal signature and the words "Approved, James M. Carter, U. S. Attorney, 2-9-48," in the handwriting of the then attorney for appellants.

Appellants (who requested of the Court below and received a \$1,000,000.00 bond, filed in Court, with the personally signed approval of their counsel), made general appearance before the Court, and sought general relief as follows:

- (a) An order validating all of the acts of the conservator, which was denied;

⁴In printing record on appeal, the printer printed the Minute Order only, instead of the formal order bearing the signatures of counsel and the Court. A photostat is therefore inserted herein of such signature page.

Appellant Home Loan Bank Board, through the U. S. Attorney and through its "principal attorney," expressly consented to and approved the order appointing the special master. By so doing, they submitted themselves to the jurisdiction of the Court below by general appearances.

The undersigned hereby consent to and approve the

Foreign Order.

It is our intent and purpose

by this order to assign all our rights, title and interest in and to the above described property to the said

Charles H. Thompson atty. for J. B. Lee & Co.

Thompson & Co., 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, 72, 74, 76, 78, 80, 82, 84, 86, 88, 90, 92, 94, 96, 98, 100, 102, 104, 106, 108, 110, 112, 114, 116, 118, 120, 122, 124, 126, 128, 130, 132, 134, 136, 138, 140, 142, 144, 146, 148, 150, 152, 154, 156, 158, 160, 162, 164, 166, 168, 170, 172, 174, 176, 178, 180, 182, 184, 186, 188, 190, 192, 194, 196, 198, 200, 202, 204, 206, 208, 210, 212, 214, 216, 218, 220, 222, 224, 226, 228, 230, 232, 234, 236, 238, 240, 242, 244, 246, 248, 250, 252, 254, 256, 258, 260, 262, 264, 266, 268, 270, 272, 274, 276, 278, 280, 282, 284, 286, 288, 290, 292, 294, 296, 298, 300, 302, 304, 306, 308, 310, 312, 314, 316, 318, 320, 322, 324, 326, 328, 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, 408, 410, 412, 414, 416, 418, 420, 422, 424, 426, 428, 430, 432, 434, 436, 438, 440, 442, 444, 446, 448, 450, 452, 454, 456, 458, 460, 462, 464, 466, 468, 470, 472, 474, 476, 478, 480, 482, 484, 486, 488, 490, 492, 494, 496, 498, 500, 502, 504, 506, 508, 510, 512, 514, 516, 518, 520, 522, 524, 526, 528, 530, 532, 534, 536, 538, 540, 542, 544, 546, 548, 550, 552, 554, 556, 558, 560, 562, 564, 566, 568, 570, 572, 574, 576, 578, 580, 582, 584, 586, 588, 590, 592, 594, 596, 598, 600, 602, 604, 606, 608, 610, 612, 614, 616, 618, 620, 622, 624, 626, 628, 630, 632, 634, 636, 638, 640, 642, 644, 646, 648, 650, 652, 654, 656, 658, 660, 662, 664, 666, 668, 670, 672, 674, 676, 678, 680, 682, 684, 686, 688, 690, 692, 694, 696, 698, 700, 702, 704, 706, 708, 710, 712, 714, 716, 718, 720, 722, 724, 726, 728, 730, 732, 734, 736, 738, 740, 742, 744, 746, 748, 750, 752, 754, 756, 758, 760, 762, 764, 766, 768, 770, 772, 774, 776, 778, 780, 782, 784, 786, 788, 790, 792, 794, 796, 798, 800, 802, 804, 806, 808, 810, 812, 814, 816, 818, 820, 822, 824, 826, 828, 830, 832, 834, 836, 838, 840, 842, 844, 846, 848, 850, 852, 854, 856, 858, 860, 862, 864, 866, 868, 870, 872, 874, 876, 878, 880, 882, 884, 886, 888, 890, 892, 894, 896, 898, 900, 902, 904, 906, 908, 910, 912, 914, 916, 918, 920, 922, 924, 926, 928, 930, 932, 934, 936, 938, 940, 942, 944, 946, 948, 950, 952, 954, 956, 958, 960, 962, 964, 966, 968, 970, 972, 974, 976, 978, 980, 982, 984, 986, 988, 990, 992, 994, 996, 998, 1000

Charles H. Thompson

James M. Carter
US ATTORNEY

William F. McKenna
FOR THE LOAN BANK BOARD

O. Melvyn & Myers by
John White

Attys for child, party defendant
and also of defendant of appeal
Home Loan Bank of Los Angeles

By and for the said child
attys for said child of appeal
John White & Myers

(b) A special election of directors of the Association which was granted and held under the Court's supervision by the former attorney for appellants, appointed by the Court as special master; and

(c) A \$1,000,000.00 bond, which was granted and is yet on file with the Court below, in full force and effect, which bears the personal approval of the then attorney for appellants;

Notwithstanding which, appellants yet maintain the Court below is completely without jurisdiction over them.

Appellants' submission to the jurisdiction is not limited to the one Court appearance. In the proceedings to bring approximately \$14,000,000.00 in Government Bonds, notes, deeds of trust, and other negotiable securities into the Registry of the Court, appellants' counsel read into the record a telegram, evidencing appellants' approval of the proceedings requiring deposit into Court. It must be remembered that many acts of appellant San Francisco Bank, particularly those having to do with deposit of assets and securities, must be approved by appellants Home Loan Bank Board.

On March 10, 1948, proceedings were being heard before the District Court which resulted in the order requiring deposit of the \$14,000,000.00 which was complied with by appellants San Francisco Bank. The Reporter's Transcript [R. 10404, *et seq.*] reads as follows:

"The Court: Ready in *Mallonee v. Fahey*?

Mr. Carter: May I be heard in this matter? . . .

The Court: . . . Now, Mr. Carter, I think you had something to say.

Mr. Carter: I have had a further communication from the Department which I think should appear

of record here. Following the hearing on Monday I sent them a telegram and received this morning the following:

‘Re your telegram *Mallonee v. Fahey* air mail letter dispatched March 8, stating that it would appear that for the present at least the Home Loan Bank Board does not wish to enter into the current litigation.’

Signed by Morrison, Assistant Attorney General.

In view of that fact, I would like to be excused from this hearing. I can have Miss Martin from my office remain in attendance, and if my presence is needed I will be glad to come down . . .”

No objection is made to the jurisdiction of the Court to granting the relief sought—the interpleader of \$14,000,000.00 into the Registry of the Court.

It is fundamental that a litigant is not permitted to blow hot and cold with the jurisdiction of a Court. To seek affirmative relief from the Court is to submit to the jurisdiction of that Court. Such was the holding of this Honorable Court of Appeals in 1922, in the case of:

Sterling Tire Corp. v. Sullivan, 279 Fed. 336;
Court of Appeals, Ninth Circuit (1922).

Action of replevin in Federal Court to take property from the possession of California State Court receiver. One plaintiff had appeared in the state court receivership action by special appearance and read a telegram into the record. On such special appearance, plaintiff’s attorney demanded, and obtained from the State Court a \$5,000.00 bond in favor of his client in case the receivership was held invalid. Upon the filing of the bond, the State Court denied the motion to vacate the appointment of the re-

ceiver. Another plaintiff likewise made a special appearance before the State Court and resisted a receivership sale. Upon their request, the sale was continued. Federal District Court held that both plaintiffs had submitted to the jurisdiction of the State Court in the receivership proceeding by asking for affirmative relief, in one instance the giving of the receivership bond and the other the continuance of the sale. On appeal, this Honorable Court of Appeals for the Ninth Circuit affirmed and said:

“In our opinion the facts show that plaintiff in error recognized the order appointing a receiver and sought the protection of its rights when, upon motion to discharge the receiver, counsel appeared in its behalf, read his authority to act and moved the state court to order a bond to indemnify his client, and obtained a favorable ruling sustaining his motion. Counsel did not then ask for entry limiting his appearance, and having obtained what he asked for in the way of an indemnity to his client, is not now in a position to contend that he made a special appearance . . .

“Nor do we believe that, when associate counsel for the New Jersey corporation appeared in the later proceeding, the motion of the receiver for instruction and for compensation, counsel’s statement that he appeared ‘specially’ can be held to have been a special appearance. Like the action that had been taken previously by first counsel who appeared, the second appearance was in no way limited to objection to the jurisdiction. In both instances counsel recognized the case in court and actively participated therein. In the one, the bond was prayed for; in the other, counsel sought a continuance of any action

in order to learn the facts and wishes of his New Jersey client. The court evidently considered his suggestions, and counsel signed and approved the order of the court. . . .” (Emphasis added.)

The similarity between our present appeal and the ruling of this Honorable Court of Appeals for the Ninth Circuit in 1922, is startling. In both, a telegram was read to the District Court. [R. 10406.] In both a bond was asked and the District Court granted the request. In the *Sterling* case the bond was \$5,000.00; in our present appeal, it was \$1,000,000.00. In addition, in our present *Mallonee* case, counsel for appellants Home Loan Bank Board asked and received a special election of directors of the Association. Counsel for appellants consented to and approved by signature the order appointing the Special Master to conduct the special election ordered by the Court at appellants’ request. He also asked for an order validating everything appellant Ammann had done as conservator. This appellant did not receive.

In both cases, counsel signed and approved an order of the Court. In our own case, the signature was a consent to the appointment of appellants’ former counsel as special master.

The Court of Appeals for the Fifth Circuit has likewise held that a request for a bond made to a District Court constitutes a general appearance, regardless of whether the bond is ordered by the Court or denied. Such a case is:

Edgell v. Felder, 84 Fed. 69 (C. C. A. 5, 1897).

Action in U. S. District Court in Georgia, against New York defendants. After appointment of receiver and issuance of a temporary injunction *ex parte*, New York

defendants entered a special appearance to contest the jurisdiction of the Court and “for the purpose of making a motion to dissolve the injunction and discharge the receiver . . .”

The injunction had been granted without bond and appellants asked the District Court to require an injunction bond be given for their protection.

District Court denied the motion and held notwithstanding the attempted special appearance, a general appearance had been made by asking affirmative relief. Court of Appeals, Fifth Circuit, affirmed and said:

“ . . . The appellants herein, having appeared in the circuit court, and entered motions to dismiss the suit for want of jurisdiction *ratione personae*, and to dismiss the bill for want of equity, and to dissolve the injunction theretofore issued in the case for want of jurisdiction, and because no previous notice of application therefor was given, and because it was issued in term time, without requiring the complainant to give bond therefor, and that the complainant should execute a bond in such sum as the court might require to protect the defendants against all damages or losses which might be suffered by reason of granting said injunction, and to withdraw the said injunction because issued prematurely, and to discharge the receiver theretofore appointed in the case, must be held to have entered a general appearance to the bill, and thereby waived any privilege they might have had to object to being sued in the district in which the complainant resides, although, by the terms of the writing actually filed with the clerk, the appearance made was a limited appearance . . .” (Emphasis added.)

Any seeking of affirmative relief (notwithstanding sought as part of a special appearance or while objecting to the jurisdiction) nevertheless is a general appearance and submits the party to the jurisdiction of the Court. The U. S. Supreme Court so held in the case of:

Merchants, et al. v. Clow, 204 U. S. 286, 51 L. Ed. 488 (U. S. Supreme Court, 1907).

Plaintiff sued defendant, an Indiana Corporation, in U. S. District Court in Illinois. Service of process was made upon Indiana corporation's local agent in Illinois. Defendant Indiana corporation moved to quash service. District Court denied motion, plaintiffs answered and also pleaded recoupment or set off. The Supreme Court held this was a general appearance and as to the other contentions on the appeal, said:

“We shall intimate no opinion either way, because it is not necessary for the decision of the case, in view of the submission to the jurisdiction which the facts disclose.

“We assume that the defendant lost no rights by pleading to the merits, as required, after saving its rights. (Citing authorities.) But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking, submitted to it. It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper. But, even at common law, since the doctrine has been developed, a demand in recoupment is recognized as a cross demand, as distinguished from a defense . . . This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position

of an actor and must take the consequences. The right to do so is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense . . .

“There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits. (Citing authorities.) As we have said, there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and, to the extent of his claim, a cross-plaintiff in the suit.” (Emphasis added.)

Another Supreme Court decision holding that seeking affirmative relief is a submission to jurisdiction and a general appearance is:

Texas & P. R. Co. v. Eastin, 214 U. S. 153, 53 L. Ed. 947 (U. S. Supreme Court, 1909).

Action was originally filed in the State Courts. Appellant defendant petitioned the State Court for removal to Federal Court. The State Court denied the petition for removal and appellant, still protesting the jurisdiction of the State Court and appearing specially, nevertheless attempted to answer and asked the State Court to bring in a new party as defendant, alleged to be liable for the matters the plaintiff charged against appellant.

The State Court granted the bringing in of the new defendant who was held throughout the trial and judgment resulted against appellant in favor of plaintiff and also a lesser judgment in favor of appellant and against the new defendant.

On appeal, appellant contended denial of removal was erroneous and that the State Court was therefore without jurisdiction. The Supreme Court held appellant had submitted himself to the jurisdiction of the State Court by asking affirmative relief and said:

“ . . . petitioner may stay in the state court and defend the action against him, and, if the judgment go against him, bring the case to this court, and have the question of removal determined. But plaintiffs in error did not defend only against the cause of action. They instituted a cause of action against the St. Louis & San Francisco Railroad Company, in which the defendant in error had no concern, and recovered a judgment against that company in the sum of \$1,800. By doing so they invoked the jurisdiction of the state court on their own account and for their own purpose, and the case is brought within the ruling in *Merchants' Heat & Light Co. v. J. B. Clow & Sons*, 204 U. S. 286, 51 L. Ed. 488, 27 Sup. Ct. Rep. 285.” (Emphasis added.)

Any form of affirmative relief sought from the Court constitutes a general appearance. Such was held in the case of:

Feldman v. Conn. Ins., 78 F. 2d 838 (C. C. A. 10, 1935).

Foreclosure proceedings based upon a confession of judgment. Appellant had stipulated in writing for a continuance upon condition that at the end of 90 days, judgment might be entered if certain payments were not made. After entry of judgment, appellant appeared by new counsel “specially” seeking to vacate the judgment and foreclosure sale.

District Court refused to vacate the judgment and the Court of Appeals, Tenth Circuit, affirmed, holding that a party seeking affirmative relief submits to the jurisdiction of the Court and thereby makes a general appearance regardless of how the appearances may be denominated, special or otherwise.

The Court of Appeals said:

“ . . . The filing of an application or stipulation for an extension of time within which to answer or otherwise plead constitutes a general appearance . . . (citing authorities). And the filing of an offer to confess judgment constitutes a like appearance . . . (Citing authorities) . . .

“ . . . (4) Apart from what has been said, the motion to set the decree aside and the motion to vacate the sale constituted a general appearance. While it was attempted to appear specially, seeking affirmative relief at the hands of the Court in the manner and circumstances stated, constituted a general appearance and waived all question respecting the jurisdiction of the Court over the person of the defendant at the time the decree was entered. (Citing authorities.)” (Emphasis added.)

Indispensable parties by seeking affirmative relief even before a special master of the Court, thereby submit themselves to the jurisdiction and make a general appearance, regardless of whether they have ever been

served or summoned or previously named as parties to the suit. Such was held in the case of:

Alexander v. Hillman, 296 U. S. 222, 80 L. Ed. 192 (U. S. Supreme Court, 1935).

The Supreme Court said:

“We come to the question whether the court has jurisdiction of the persons of respondents in respect of the counterclaims . . . But petitioners insist that by presenting their claims respondents submitted themselves to the jurisdiction of the court to grant affirmative relief on the causes of action alleged against them . . .

“Respondents’ contention means that, while invoking the court’s jurisdiction to establish their right to participate in the distribution they may deny its power to require them to account for what they misappropriated . . .

“By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance, §51 to the contrary notwithstanding. (Citing cases.)” (Emphasis added.)

If the Court below was without jurisdiction, as appellants now contend, they have voided by their own act the million dollar bond filed with the Court at their request. Had the Court granted their motion and made an order validating every act of appellant Ammann as conservator, would appellants now contend the Court was without jurisdiction and such order was void?

Appellants must not be permitted to speculate the outcome of the Court’s decisions, to blow hot and cold, and to decide that the Court has jurisdiction if they obtain all the relief they ask, but that the Court does not have

jurisdiction if they are denied any of their numerous requests.

Regardless of general appearance the Court had jurisdiction *in rem* over the \$70,000,000.00 of seized assets.

THE COURT HAS JURISDICTION UNDER 118.

The actions are in the nature of quiet title and replevin to recover physical possession and ownership of \$150,000,000.00 real and personal property, located physically within the district of the Court below, and \$14,000,000.00 of which is physically in the registry of such Court in the possession of its clerk. [R. 22-25, 354-358, 3088-3094, 3333-3339.]

The possession and title to such real and personal property has been transferred and clouded by a series of administrative orders alleged by appellees, plaintiffs to be, either or both void and voidable. [R. 2974-2982, 3193-3194.] Review of such orders was sought by recovery of possession and title to such real and personal property and quieting such title and possession against any further interference or harassment under such void or voidable administrative orders.

The nature of the action is decisive of both venue and jurisdiction which must be where the real and personal property involved is physically situated.

ORDERS REVIEWABLE.

Such action does not require personal jurisdiction over any defendant. (However such personal jurisdiction does exist over all appellants as hereinelsewhere set forth.)

The Court below, within whose district was situated the \$150,000,000.00 of real and personal property, has

jurisdiction to review such administrative orders, as they affect ownership and title to such real and personal property. Such jurisdiction existed prior to and independently of the Administrative Procedure Act. (See section of this brief pages 205 to 235, "Orders Are Reviewable.")

In addition to such inherent jurisdiction, the Administrative Procedure Act expressly confers jurisdiction on the Court below to review such administrative orders affecting title to, and possession of real and personal property.

(a) The Administrative Procedure Act, Title 5, U. S. C. A., Section 1009, Subdivision (a), reads in part:

“ . . . RIGHTS OF REVIEW. Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

Subdivision (c) defines reviewable acts:

“Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.” (Emphasis added.)

Subdivision (b) provides:

“The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. . . .”

The effect of the administrative orders sought to be reviewed is controlling as to the Court “. . . of competent jurisdiction . . .” to review such orders.

The Court's review of “agency action” has been in progress for nearly five years. It has been, or now is, the subject of fifteen (15) court proceedings, including two (2) in the U. S. Supreme Court and seven (7) in this Honorable Court of Appeals. (See description of the litigation, pages 1 to 4, this brief.)

The five administrative orders being reviewed were of peculiarly local effect. [R. 8225, Ftn. 5; R. 8229, Ftn. 6; R. 8231, Ftn. 7.] They directly transferred title to and possession of real and personal property situated in California. The orders being reviewed were all final.

Three of the orders, 5082, 5083 and 5084 [R. 8225-8228, Ftn. 5] dated March 29, 1946, purported to instantaneously liquidate, merge, and dissolve the solvent and growing appellee Federal Home Loan Bank of Los Angeles, and its \$46,000,000.00 in assets, including a surplus of approximately \$1,900,000.00 [R. 3194], and at the same time to instantaneously create appellant San Francisco Bank: all without notice, hearing or trial, and without the consent and against the will of the stockholders of all Federal Home Loan Banks concerned. [R. 4571-4572; Clk. Tr. 14526-14528; Movant's Ex. No. 10.]

The immediate effect of such orders, if valid, was to transfer from appellees to appellants, physical possession, ownership and title to the thousands of notes, deeds of trust, U. S. Government bonds, and other negotiable securities, bank deposits and cash, comprising the \$46,000,000.00, all of which were physically situated in the City of Los Angeles, California, within the territory of the Court

below. [R. 9466.] Enforcement of said orders placed appellants in possession of said securities, bonds and cash, and apparently vested appellants with title thereto. This title was assigned and transferred by appellants in multi-million dollar amounts in daily reoccurring transactions, one of which in particular became the immediate concern of the Long Beach Association. [R. 6.]

This was the transaction wherein \$7,300,000.00 of such seized Los Angeles Bank assets were assigned and transferred by appellants' San Francisco Bank, *et al.*, to appellant Ammann, as purported conservator of the Long Beach Association. [R. 6761.]

Fifty-two days after his confiscation of the Los Angeles Bank, Ammann seized the Long Beach Association without order or process whatsoever. [R. 3194.] As authority for his seizure, he signed his own name certifying his own appointment, without notice, hearing or trial, as purported conservator, and with threats of criminal prosecution if said order was resisted, completed his seizure of the \$26,000,000.00 of Long Beach Association assets. [R. 3210-3212.] Ammann refused to give any receipt or acknowledgment whatsoever for any of the cash negotiable securities and bearer government bonds or other assets thus seized. [R. 3212.]

Ammann attempted to obligate the seized Long Beach Association to appellants' San Francisco Bank, created fifty-two days previously by similar seizure in which appellant Ammann participated and certified the seizing orders.

Appellant Ammann transferred to appellant San Francisco Bank several thousand notes and trust deeds, aggregating approximately \$12,000,000.00. These notes and

ORDINARY

NOT DESTROY THIS NOTE: When paid, this note, with Deed of Trust securing same, must be surrendered to trustee for cancellation, before reconveyance will be made.

Note Secured by Deed of Trust

\$ 10,000, California, 1943

In installments and at times hereinafter stated, for value received, I promise to pay to _____

_____ or order,

at _____

the principal sum of _____ DOLLARS

with interest from _____, 19 _____ on unpaid principal at the

rate of _____ per cent per annum; principal and interest payable in monthly installments

each, on the _____ day of each month, beginning on the _____ day of _____

and continuing until said principal and interest have been paid in full.

Each payment shall be credited first on interest then due and the remainder on principal; and interest shall thereupon cease upon the principal so credited. Should default be made in payment of any installment when due, or in the performance of any agreement in the deed of trust securing the payment of this note, the whole sum of principal and interest shall become immediately due at the option of the holder of this note and shall, at the option of such holder, bear interest during the period of such default at the rate of _____ per cent per annum. Principal and interest payable in lawful money of the United States. If action be instituted on this note, I promise to pay such sum as the court may fix as attorney's fees. The holder hereof agrees to accept additional payments, provided, however, that should the amount prepaid equal or exceed 20 per cent of the original amount of the loan, 90 days unearned interest on the amount so prepaid may be charged as a bonus.

This note is secured by DEED OF TRUST to TITLE SERVICE COMPANY, A California corporation.

Raymond L. Hunter
Edna H. Hunter

BACK - SIDE

trust deeds were the property of the Long Beach Association, custody of which had been seized by Ammann. [R. 3224.]

The transfer of the \$12,000,000.00 of Long Beach Association trust deeds to the San Francisco Bank was by endorsement of an absolute assignment on each of the several thousand in notes. The endorsement was made by an undated, unauthenticated rubber stamp signed by Ammann as conservator of Long Beach Association. [R. 3257-3258; see Plate 4.]

Notwithstanding such assignments, he continued to accept the monthly and other payments upon said notes and deeds of trust after such assignment of title and delivery of possession by him. [R. 3258-3259.] Thereby, he made every homeowner whose real property and deed of trust thereon were seized, assigned and conveyed in either or both seizure, proper parties to any action to determine the validity of either (a) the seizure, liquidation or dissolution of the \$46,000,000.00 Los Angeles Bank; or (b) the attempted confiscation of the Long Beach Association. All title claimed by appellant Ammann, transferred by him to appellant San Francisco Bank, and involved in his other multi-million dollar transactions with the seized Long Beach Association assets, is based upon this order of seizure, signed by appellant Ammann himself.

Seizure of possession of the premises of the Los Angeles Bank likewise placed appellants in possession and control of the millions of dollars of negotiable government bonds, notes and deeds of trust, entrusted to the Los Angeles Bank by its customers for safekeeping only. Among such seized safekeeping assets was \$8,300,000.00 of U. S. government bonds owned by the Long Beach Association

which was not indebted to the Los Angeles Bank, or any other Federal instrumentality in any amount whatsoever.

After twenty months in possession of said association, following the 1946-47 proceedings before the United States Supreme Court and during the pendency of two earlier appeals before this Honorable Court of Appeals for the Ninth Circuit appellants rescinded the appointment of Ammann as conservator. This was Order No. 388 dated January 17, 1948, which removed appellant Ammann as conservator required him to return what remained of the \$26,000,000.00 in assets which he had seized and required him to account to the Court below for his dealings with such seized assets. [R. 8231, Ftn. 7.]

Such order, by its terms, required that a certified copy thereof be filed with the Court below, and that the accounting required of appellant-defendant Ammann be likewise filed with the Court below. Both such order and Ammann's attempt at such accounting were so filed. [R. 8614-8742.] Because appellants desired to amend and supplement their accounting, it was returned without being printed from the Clerk of the Court of Appeals to the Clerk of the District Court, so as to be available for proceedings.

Two of the administrative orders being reviewed thus affected the seizure and relinquishment of the Long Beach Association and its \$26,000,000.00 in assets.

Order No. 388 as did its four predecessors, affected the title and possession of millions of dollars and assets of appellee Long Beach Association. However, because of the \$10,000,000.00 run of withdrawals caused by appellant Ammann, and his multi-million dollar transactions with seized Long Beach Association's assets, the Association,

when returned by appellant Ammann, was almost without assets. [R. 3562.]

All five of these administrative orders purported to be final and conclusive on their face. They affected, and were operative upon, the real property of thousands of California citizens, residents within the district of the Court below. Any Court asked to review any one or more of these five administrative orders, and determining their validity or effect, must of necessity, have *in rem* jurisdiction over the real and personal property involved in order to make an adjudication binding upon such property.

In March of 1948, when the progress of the review of all five of said final administrative orders, had progressed for two years, the Court below made an order requiring deposit into the registry of the Court of approximately \$14,000,000.00 of assets. [R. 8399.] The order was made for the purposes of preventing through the remaining years of litigation, the necessity for homeowners whose titles had been clouded by the seizures and multi-million dollar transfers and assignments of the seized assets of the Los Angeles Bank and the cross-assigning of the seized assets of the Long Beach Association. [R. 8399.]

Such order was complied with by appellants. No appeal was ever taken therefrom and it has long since become final. Among findings of said order are [R. 8409]:

“That pending final judgment and decision of the various issues of the within consolidated actions neither said Long Beach Federal Savings and Loan Association, alone, nor said Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, alone, nor said Federal Home Loan Bank of Los Angeles, alone, nor any of the parties to this action can, without the aid and

assistance of this court, make, execute and deliver to the said borrowers and homeowners an effective release, reconveyance and discharge of their real property.”

“ . . . That among the injuries which would flow to said homeowners, and borrowers and purchasers by failing to require such deposit pending the final judgment in the within action, are (1) the inability of said thousands of borrowers and homeowners to secure a merchantable, or insurable title to the particular real property involved, which in turn would prevent either a sale thereof, or a loan or refinancing thereon, or a payment and termination of the interest and obligations of the present loans and deeds of trust thereon, and (2) a multiplicity of suits which might involve all of the issues raised, or which can be raised, in the instant litigation, and all of the parties to the present litigation; which injuries and damage are found to be grave, irreparable and continuing as to the thousands of borrowers and homeowners who have given their notes and deeds of trust to said Long Beach Federal Savings and Loan Association and conveyed the titles to their homes as security for said loans.

[R. 8412.] “That by custom and usage in the County of Los Angeles, State of California, policies of title insurance are required for marketable and merchantable title to real property to be sold, encumbered or conveyed in said County and State.

“That if such payment by said Long Beach Federal Savings and Loan Association of said sum to be made to one of said conflicting claimants to the exclusion of the other, and the other claimant thereafter would be held to have been entitled to such payment, then the owners of the various properties

under trust deeds may each be subjected to claims upon their notes and property for a portion of such total liability, which possible liability exists as a cloud upon the title to each of the thousands of properties involved and prevents each of them from securing a merchantable and insurable title, unless the within Order is made. That the making of the within Order thus avoids the complex, multiple and conflicting claims and demands which may be made upon the approximately 8,000 individual borrowers of said Association.” [R. 8410-8412.]

These findings have become final for three years for lack of appeal therefrom. Present appellants complied with the requirements of that order of the District Court, now almost three years old, yet they contend that this District Court, within whose territory was situated all of the thousands of parcels of real properties, was completely without jurisdiction to take the action which cleared the titles to the homes of the thousands of innocent borrowers whose only part in this litigation was that they had loans on their homes, obtained from one or more of the institutions seized and confiscated by the appellants or their predecessors.

Appellants contend by this appeal that the Court below could not prevent them by preliminary injunction from again clouding the titles to the thousands of homeowners, as the same were clouded in the first two years of this litigation.

Only a Court having within its territorial jurisdiction the real and personal property involved in these seizures can effectively adjudicate in one proceeding, the right and liability of all of the parties affected by such seizure and

inter-dealing between the two seized institutions of the multi-million dollar amounts of assets, possession and title to which was obtained by such seizure.

Appellants admit that they obtained possession of the \$46,000,000.00 of assets in the Los Angeles Bank and the \$26,000,000.00 of assets of the Long Beach Association. [R. 4057-4058.] Title to the assets of both institutions was claimed by appellants through the five (5) administrative orders and by the transfers and assignments of the seized assets thereunder. The determination of the validity of the title thus asserted requires that the Court have jurisdiction over the assets themselves, in order to make an adjudication binding upon all of the claimants of such title and possession.

The only Court capable of such adjudications is the U. S. District Court for the Southern District of California, before whom this litigation has been pending for almost five years.

The District of Columbia District Courts might have jurisdiction over Fahey, Divers and Adams, etc., but could enforce no jurisdiction over the thousands of homeowners, the thousands of depositors in the Long Beach Association, the 176 association stockholders of the seized Los Angeles Bank, the 300 associations presently stockholders of the purported San Francisco Bank (if it exists), the Title Service Company, trustee of the homes of the 8,000 borrowers from the Long Beach Association notes and trust deeds, seized by Ammann and assigned to the San Francisco Bank. The District of Columbia District Court could have no jurisdiction over the title to the thousands of parcels of real property situated in Los

Anoeles County, California, nor to the title, or possession of the \$46,000,000.00 of seized Los Angeles Bank assets. or the \$26,000,000.00 of seized Long Beach Association assets.

Any adjudication made by the District of Columbia Federal Court would have no binding effect on appellant San Francisco Bank, whose principal place of business was San Francisco, California, nor of any of the hundreds of other parties to this litigation in the Court below.

The only parties objecting to the jurisdiction of the Southern California U. S. District Court are those, Fahey, Divers, Adams and LaRoque, who purported to authorize or ratify the seizure of possession and title to real and personal property in California, and who attempted through their representatives to physically seize such possession from California citizens and transfer the seized possession together with the title and ownership, to others yet within the State of California.

To hold that these actions must be brought in Washington, D. C., is to deny all effective relief.

Appellants San Francisco Bank and Ammann are both objecting to the jurisdiction of the Southern California U. S. District Court within whose jurisdiction they were physically served with process and summons [R. 41, 9506-9507], and into whose Registry they have deposited assets aggregating approximately \$14,000,000.00.

If the action were brought at Washington, D. C., in the District of Columbia District Court, Ammann the conservator, in possession of the seized Long Beach assets and San Francisco Bank in possession of the seized Los Angeles Bank assets, could rightfully object that the

Washington, D. C., Federal Court had neither jurisdiction over them personally, nor jurisdiction *in rem*, over the seized real and personal property. Any adjudication by the Washington, D. C., Courts would be completely ineffective to remove from the San Francisco Bank the \$46,000,000.00 in seized Los Angeles Bank assets or to recover the \$26,000,000.00 in seized Long Beach Association assets.

The problems thus presented, the adjudication of, possession of, and title to, real and personal property, are solved if action is brought before a Court which has *in rem* jurisdiction over such property within its district. Such jurisdiction can arise only from the physical situation of the real and personal property, within the territory of the District Court.

The Court below found in an order made March 13, 1948 (from which no appeal was ever taken) [R. 8412-8524], as follows:

“That all of the assets, and properties, herein described, notes, deeds of trust, United States Government Bonds, and other collateral are physically within the confines and boundaries of the Southern District of California and are thus physically within the jurisdiction of this Court. That all of said four notes (Exhibits “F,” “G,” “H,” and “I” of the said Noon Affidavit) are payable at the branch office of the said San Francisco Bank in the City of Los Angeles, County of Los Angeles, State of California. That all of the thousands of notes and deeds of trust hereinafter specifically described are payable at the offices of the Long Beach Federal [12180] Savings and Loan Association, in the City of Long Beach, Los Angeles County, California. That all of the thousands of parcels of real property, homes of the bor-

rowers of Long Beach Federal Savings and Loan Association specifically described in said deeds of trust herein elsewhere described in detail are situated within the confines of the Counties of Los Angeles and Orange, State of California, all physically within the boundaries of the Southern District of the said United States District Court.

“That all of the United States Bonds hereinafter specifically described are physically located at the Los Angeles Branch of the Federal Reserve Bank of San Francisco, in the City of Los Angeles, County of Los Angeles, State of California, within the confines of, and boundaries of, the United States District Court for the Southern District of California.

“That each and all of the things, documents, notes, bonds, securities, properties, trust deeds and collateral herein required to be deposited are within the physical custody, control and/or possession of the said Frank C. Noon, as Los Angeles Branch Manager of the said San Francisco Bank, and are within the ability and power of said San Francisco Bank to deliver in compliance with this Order.

“That there is already on deposit in the Registry of this Court and within the custody, jurisdiction and control of this Court, a sum in excess of \$1,500,000.00 in cash, heretofore deposited as a result of numerous individual intervenors, seeking the aid of this Court, in the clearing of the encumbered and clouded titles to their homes.”

Each of these findings have become final from lack of appeal therefrom, or from dismissal of prior appeals therefrom.

The fact that certain of the defendants acting upon, or claiming the right to make, administrative orders affect-

ing the title to, or possession of, such real and personal property, may be absent from the district of the Court having *in rem* jurisdiction of the real and personal property, presents no obstacle.

The authority of Courts to adjudicate ownership and possession of real and personal property within their territorial limits is as old as the Anglo-Saxon system of jurisprudence. Such authority in the Federal Courts was recognized in the early United States statutes, was embodied in Title 28, Section 118 (until 1948 and was re-enacted in new Title 28, Section 1655). When these actions were commenced in 1946, Section 118, Title 28, U. S. C., read in part:

“When in any suit commenced in any district court of the United States to enforce any . . . claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, . . . WHEREVER FOUND, and also upon the person or persons in possession or charge of said property, if any there be; . . . In case such absent defendant shall not appear, . . . it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without

appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district;”
(Emphasis added.)

Pursuant to this section, service of summons and complaint was immediately made upon appellant Ammann at Long Beach, California, as the “person in possession or charge of such property.” [R. 41.]

He was also served with a certified copy of a temporary restraining order issued by the District Court at Los Angeles within whose territory defendant Ammann was found and the assets were situated. The order provided in part:

“It Is Hereby Ordered that the defendants and each of them be, and they are hereby enjoined and restrained from and of making, attempting to make, or instituting any merger, consolidation, reorganization of said Long Beach Federal Savings and Loan Association, and from and of making any transfers, assignments, conveyances of any and all of the assets thereof, which might effect or bring about such merger, consolidation and/or reorganization, and from and of uniting, commingling, joining or consolidating the securities, assets, cash, resources, properties, membership shares of said Association, with those of any other association, bank, corporation, organization or institution whatsoever, without the order of this Court so to do first being had and obtained.”

Shortly thereafter, a *lis pendens*, covering 256 pages of legal descriptions and referring by title and case number to this litigation, was recorded in the Office of the County Recorder in Los Angeles County, California, wherein was

situated most of the real property, security for the thousands of notes and deeds of trust seized by appellant Ammann. [R. 8286.]

In rem jurisdiction in a local action to determine title and possession to real and personal property within the territory of the District Court below was thus conclusively established.

The person in possession was personally served within the district. By *lis pendens*, the world was notified of the pendency of the action affecting the thousands of homes of the borrowers. At this time, in May of 1946, appellant Fahey, the one-man "Home Loan Bank Board," called himself the "Federal Home Loan Bank Administration." He was the only non-resident defendant in the local action.

Application was made to the District Court and an order obtained for the service of summons and complaint, together with a copy of such order of Court upon the absent defendant Fahey at Washington, D. C. [R. 65-66, 66-67, 81-82, 9502-9503, 9507-9508.]

Service of such summons, complaint and order, was made by the U. S. Marshal in the District of Columbia and return of such service filed with the District Court for the Southern District of California. Full compliance with Section 118, of Title 28, U. S. C., was thus made by plaintiffs. [R. 795-804.]

When appellant Fahey was removed as the one-man Home Loan Bank Board, his successors were substituted as defendants by appropriate proceedings before the Court below [R. 2771], and as various changes in the membership of the reorganized Home Loan Bank Board occurred, further substitutions were similarly made before the Court below. [R. 4335, 4340, 4349-4358, 4547.]

Notices of such substitutions were given as required by order of the Court below, prescribing the time and manner of such notice. [R. 4342-4356, 2543-2557.] Appellants were represented by counsel at all such substitutions and made no objections thereto.

The finding "That the Court has jurisdiction of the persons and subject matter involved" was in the order of the Court below of April, 1947 [R. 2355], against which appellants petitioned the U. S. Supreme Court for a writ of prohibition, mandamus and/or injunction. The writ was denied in *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, after which the Court below, on September 2, 1947, signed the order. Appellants immediately applied to this Honorable Court of Appeals for a stay and after printed briefs and argument, this Court of Appeals denied the stay.

Shortly thereafter, appellants dismissed their appeal from the order containing such finding. Notwithstanding this state of the record, appellants on this appeal again attack the jurisdiction of the Court below and claimed that findings contained in the preliminary injunction on the matter of jurisdiction are "without any support in the evidence or are erroneous as a matter of law." (Appellants' Brief, page 23, Specification 13.)

Who are the non-resident defendants not served within the jurisdiction?

Appellants have devoted much of their brief to attacks upon the action being maintained against non-resident defendants not served within the district. They carefully avoid naming this class, none of whom is appealing. Certainly one appellant cannot attack matters of no concern to that appellant.

The only non-resident appellants not served within the district, are Divers, Adams and LaRoque. They made a general appearance before the Court by Resolution No. 388, which required by its terms, that a certified copy be filed with the Court. They did not appeal from the judgment entered upon such general appearance, which by their own brief, they admit was a final judgment. (See App. Br. pp. 34 and 82.)

The only other non-resident appellants, Bramley and Ammann, were served within the jurisdiction.

Appellant Federal Savings and Loan Insurance Corporation, a corporation doing business within the State of California, is not a non-resident, nor is this a matter which can be settled short of a trial. The allegations in the pleadings that the corporation is doing business in California are denied. Whether or not an insurance corporation guaranteeing the safety of the savings of the 16,000 shareholders and seeking its own appointment as receiver at Long Beach, California, can claim to be immune from the process of the Court, whose judgment is thus to be violated, is a matter which should not be determined on a preliminary injunction. (See Section I of this brief.)

It is significant that the officers and directors of the San Francisco Bank who are not appellants in this appeal, sought their independent remedy by way of a writ of prohibition, mandamus, etc., application for which was lodged with this Honorable Court of Appeals in February of 1950 and leave to file the petition for the writs was denied by this Honorable Court of Appeals in June of 1950.

The claim for damages was made in the action for the first time after the so-called non-resident defendants had made their general appearances.

The claims were raised by an amendment to the then pending pleadings, made by direction of the trial court, that the Association set forth all further matters necessary to a trial of the action on the matters remaining after the removal of the conservator and the restoration of the Association to its founding management. [R. 3764.]

After the general appearances and the submission to the jurisdiction of the Court, to have failed to file the damage claims against the personally appearing defendants, would have been, under the doctrine of compulsory counter-claiming prevailing in the Federal practice, a waiver and abandonment by the Association of such damage claims. The Association withheld the filing of action upon conservator Ammann's \$100,000.00 bond until the last possible moment because the Association was relying upon the then pending negotiations for settlement and a compromise of the entire controversy.

Section 118 of Title 28, U. S. C., as it existed in 1946, was the subject of interpretation by the Eighth Circuit in 1928 in the case of:

Omaha Nat. Bank of Omaha, Neb. v. Federal Reserve Bank of Kansas City, Mo., et al., 26 F. 2d 884 (C. C. A. 8, 1928).

The opinion reads in part as follows:

“(1) This suit was brought under section 118, title 28 U. S. C. A. (Judicial Code paragraph 57), by the Omaha National Bank of Omaha, Nebraska, against FEDERAL RESERVE BANK OF KANSAS CITY, MISSOURI,

Wyoming National Bank of Casper, Wyoming, First National Bank of Cheyenne, Wyoming, and T. E. McClintock, receiver of the First National Bank of Cheyenne, Wyoming, and was dismissed on the ground that the court was without jurisdiction. That section deals with local actions or suits, and there are two indispensable requirements to give the court jurisdiction: (1) The complaint must show that the subject-matter, the *res*, is within the territorial jurisdiction of the court, and (2) there must be diverse citizenship and residence between the plaintiff and all defendants who are necessary parties; and it does not matter that plaintiff is or is not a citizen and resident of the State in which the suit is brought. Its purpose is to enable him to obtain a judgment or decree that will bind the *res*, though the defendants are all nonresidents and cannot be personally bound unless they enter general appearance or should be served within the district."

"(5) . . . it is contended that the facts pleaded show only a paper transaction, which did not create or bring under the court's jurisdiction any personal property within the meaning of section 118, that the section contemplates some specific tangible thing, that here no money passed, no particular fund was created, only book entries were made at plaintiff's direction in the Omaha Branch bank, and there is no *res* in the State and district of Nebraska which can be adjudged upon and disposed of by the court. It would be hard to convince men who devote their time to business and financial transactions that there is any merit in the contention. As proof to the contrary, and as a matter of common knowledge, the \$60,000 will be handed over at the Branch bank's counter on proper orders to him who is entitled to it. In every practical and business sense the \$60,000 is there, and it is a sacrifice

of substance to form to say it is not. For remedial purposes on plaintiff's bill we think the situs of any property interest in the transferred deposit was at Omaha. In *C. R. I. & P. Ry. Co. v. Sturm*, 174 U. S. 710, 19 S. Ct. 797, 43 L. Ed. 1144, it was held . . . that the situs of a debt was with the debtor. The court said:

“ ‘This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of proceeding *in rem* . . . Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us.’ ”

“The same proposition is learnedly discussed and a like conclusion reached in *McBee v. Purcell Nat. Bank*, 1 Ind. T. 288, 37 S. W. 55. Corporate shares represent the owners' right to a pro rata interest in corporate assets that may never be parceled among shareholders. The right as property, though intangible, is real, and is personal property within the purpose and meaning of this section. *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, 20 S. Ct. 559, 44 L. Ed. 647. It was there said, on the contention that the statute had reference only to tangible personal property; ‘This would be too narrow an interpretation of the statute.’ See also *Citizens' Sav. & Tr. Co. v. Ill. Cent. R. R. Co.*, 205 U. S. 46, 27 S. Ct. 425, 51 L. Ed. 703; *Franz v. Buder* (C. C. A.) 11 F. (2d) 854; *Norrie v. Lohman* (C. C. A.), 16 F. (2d) 355. In *Goodman v. Niblack*,

102 U. S. 556, 26 L. Ed. 229 . . . Goodman
. . . sued pursuant to the terms of this section as
it stood prior to the amendment of March 3, 1875
. . . In holding that the suit was maintainable
Mr. Justice Miller, speaking for the court, said of
this section:

“ ‘This is a proceeding in equity to enforce a lien
on the fund which is within reach of the court, and
as the trustee and complainant have the requisite
citizenship, section 738 of the Revised Statutes (28
U. S. C. A. §118) provides a remedy . . . If
they appear, the suit will proceed as usual. If they
do not appear, the decree, so far as it affects the
fund in the hands of Niblack, will bind them; and
this is all that is necessary to give the court juris-
diction to grant the relief prayed for by the com-
plainant . . . ’

“ . . . Accepting the allegations as stating the
true facts, we think the \$60,000 transferred to the
credit of Wyoming National Bank in the Omaha
Branch Bank was personal property within the
court’s jurisdiction, to which plaintiff asserted an
equitable claim and title, and in that respect the suit
was one properly brought under section 118 . . . ”

In our present appeals the Court found that there are
\$8,500,000 of notes and deeds of trust all payable at the
premises of the Long Beach Association, within the ter-
ritory of the District of the U. S. District Court for
the Southern District of California. That the debtors
(the borrowers from Long Beach Federal) reside within
the County of Los Angeles, which is within the territory
of the said U. S. District Court for Southern California.
[R. 8402.]

The District Court found in its order of March 13, 1948, (*from which no appeal was ever taken*), requiring the deposit into the Registry of the Court of approximately \$14,000,000.00 of such notes, deeds of trust, and government bonds, as follows:

“That in the transactions between the said defendants A. V. Ammann, purportedly acting as conservator for said Long Beach Federal Savings and Loan Association, and the defendant Federal Home Loan Bank of Portland, sometimes also known as the Federal Home Loan Bank of San Francisco, the said defendant A. V. Ammann, by written assignments on separate documents describing said thousands of deeds of trust, and by assignments upon the backs of each of the original notes therein concerned attempted to assign and transfer or pledge said thousands of notes and deeds of trust securing the same in which Long Beach Federal Savings and Loan Association was named as beneficiary.

“That each of said deeds of trust securing said notes conveyed the legal title of a separate piece of real property which was the home of a borrower of Long Beach Federal Savings and Loan Association to defendant Title Service Company, or to other corporations, as trustee to secure the payment of sums of money borrowed by said borrower from said Long Beach Federal Savings and Loan Association upon the terms and conditions set forth in said notes and deeds of trust thus purportedly assigned and transferred by defendant Ammann to defendant, said San Francisco Bank.” [R. 8409.]

“ . . . That all of the thousands of notes and deeds of trust hereinafter specifically described are payable at the offices of the Long Beach Federal Savings and Loan Association, in the City of Long

Beach, Los Angeles County, California. That all of the thousands of parcels of real property, homes of the borrowers of Long Beach Federal Savings and Loan Association specifically described in said deeds of trust herein elsewhere described in detail are situated within the confines of the Counties of Los Angeles and Orange, State of California, all physically within the boundaries of the Southern District of the said United States District Court.”
[R. 8413.]

In the same Order R. 8421, the trial court gives in detail serial numbers of each of the \$5,300,000.00 aggregate total of U. S. Government bonds, and on pages 8423 to and including 8518, for a total of 95 printed pages, of record, the Court in its order describes the amount of the deeds of trust, the date of their execution, the name of the borrowers, the name of the trustee, the date of recordation and the book and page of recordation in the office of the County Recorder of Los Angeles County, California, of the \$8,500,000.00 of such notes and deeds of trust affected by such order of the District Court.

Appellant San Francisco Bank, pursuant to the terms of this order, delivered into the registry of the Court each of the thousands of notes and deeds of trust therein described, and each of the \$5,300,000.00 in United States government bonds, the serial numbers of which were described in such order, and no appeal was ever taken from those findings of fact, made after contested hearing extending over several days with the vice president of appellant San Francisco Bank, one of the witnesses.

The *Omaha Bank* case, above quoted, holds that the situs of a debt is the place of residence of the debtor. The above findings demonstrate that as to \$14,000,000.00 of the \$26,000,000.00 of Long Beach assets in issue in this litigation were physically within the registry of said Court, in the custody of its clerk. [R. 8268-8269.]

Among the issues in this litigation is the ownership and voting rights of stock in whichever of the Federal Home Loan Banks of Portland, San Francisco or Los Angeles, are found by the Court to be in existence. The Preliminary Injunction, the subject of the present appeal, was granted by the Court below to preserve the *status quo* pending its decision of that (and other issues) to be decided on the trial on the merits. The Court of Appeals, Seventh Circuit, considered the jurisdiction of a District Court to enjoin non-resident defendants under identical circumstances in the case of:

Harvey v. Harvey, 290 Fed. 653 (C. C. A. 7, 1923).

Action brought in U. S. District Court in Wisconsin against defendants, who were residents of Ohio to adjudicate title to stock in Wisconsin corporation which had its principal place of business within the District of the United States Court in Wisconsin. The certificates of stock were in the possession of one of the defendant corporations in Ohio and all defendants were residents of states other than Wisconsin. Appellants contend the action was *in personam* and could not be brought under Title 28, Section 118, U. S. C. (now new Title 28, U. S. C., Sec. 1655). Appellants particularly objected to a Preliminary Injunction issued by the United States Court in Wisconsin restraining out of state defendants

from voting or otherwise dealing with the stock certificates *in Ohio*.

The Court of Appeals affirmed the preliminary injunction and said at page 659:

“Appellant’s contention that the injunction granted relief *in personam* and therefore cannot be based upon service under section 57 (Sec. 118, Title 28), which applies to actions *in rem* is not well founded. This suit is in the nature of a suit to quiet title to personal property within jurisdiction of the court. The court has in its custody the *res*. It puts out its protecting hand and says to the defendants that the plaintiff claims the *res*; that pending the determination of that claim the *status quo* shall be maintained and the defendants restrained from using the *res*; that if they desire to contest the claim of the plaintiff to this property they shall come into court and do so . . .

“. . . Consequently the court may determine the ownership, and, pending that determination, restrain all acts conflicting with the owner’s muniments and incidents of ownership. Thus it may cancel contracts alleged to be fraudulent incumbrances upon plaintiff’s title; it may enjoin the performance of contracts alleged to be illegal incumbrances upon plaintiff’s title; it may, in short, make any order that is necessary to secure plaintiff the full enjoyment of his property within the court’s jurisdiction, by injunction or otherwise, if within the prayer of the bill. . . . (Citing authorities.)

“These cases are appeals from the order granting a temporary injunction and the order refusing to vacate or dissolve the same. The merits of the controversy between the parties are not before the

court, except in so far as necessary to determine whether the plaintiff by his bill and affidavits has made out a case sufficient to sustain the temporary injunction . . .” (Emphasis added.)

Another case involving the same point is:

Commonwealth Trust Co. v. R. F. C., 28 Fed. Supp. 586 (District Court, 1939).

wherein, a Government agency, Reconstruction Finance Co., claimed it could be sued only in the District of Columbia. In denying this claim, the Court said:

“. . . the action is local in its nature, and is for the recovery of specific personal property . . .”

“The property involved in this law-suit is located in this District. It is in the possession of the defendant through its authorized agent. The plaintiff claims he is entitled to this property. We therefore hold the defendant is suable in this District in an action to recover it . . .”

A similar case was:

Consolidated etc. Mining Co. v. Callahan, et al., 228 Fed. 528 (District Court, Idaho, 1915).

The Court said in discussing Section 118, Title 28, U. S. C.:

“. . . the primary purpose of the statute was to enable federal courts to acquire jurisdiction of the persons of nonresident parties whose presence might be necessary to an adjudication of local actions touching the status of property within the district . . .”

The Court also by its *in rem* jurisdiction in interpleader over the assets physically in its Registry and otherwise under its interpleader jurisdiction, acquired nationwide jurisdiction over all appellants.

IN INTERPLEADER.

(1) Under Section 41, Subdivision (26), Title 28, U. S. Code, statutory interpleader as it existed in 1946, when the actions were commenced and the original interpleader filed, and as amended, in new Title 28 U. S. C. Sections 1335, 1397, and 2361;

(2) Under inherent equity interpleader and bills in the nature of interpleader in federal courts generally;

(3) Under interpleader by Rule 22, F. R. C. P.

In the nearly five years during which this litigation has been expanding to include over 20,000 pages of clerk's transcript, hundreds of individual parties and several class actions, there have been between fifty and sixty separate or cumulative interpleaders, resulting in the deposit of approximately \$14,000,000.00 in assets presently in the registry of the Court below. [R. 8288-8291, Ftn. 15.]

The amounts of the individual interpleaders have varied from as high as \$6,300,000.00 in one proceeding to clear the titles to approximately 4,000 homes of 8,000 borrowers, to individual home owners struggling to clear the tangled titles to their individual homes and causing to be deposited into Court amounts as low as \$1,000.00 (the balance yet due on loans on their homes). [R. 7848-7849; 8296.]

The procedure has included cross-claims, in interpleader, and in the nature of interpleader, motions seeking interpleader (and in the nature of interpleader) relief, complaints in intervention, and all of the proceedings permitted by the liberal Federal Rules of Civil Procedure.

The basis in law of these numerous interpleaders has been one or more of the following:

(1) Statutory interpleader under old Title 28, Section 41(26), (prior to amendment in 1948), now Sections 1335, 1397 and 2361 of Title 28, U. S. Code;

(2) Interpleader under Rule 22 F. R. C. P.;

(3) Inherent equity powers of Federal Courts to receive interpleaders and bills in the nature of interpleader.

The requirements of diversity of citizenship, amounts in excess of \$500.00, conflicting claimants to the property interplead, necessary for filing an original action in the Federal Court, were met by the various proceedings. However, diversity of citizenship is not a requisite of interpleader by cross-claim, motion, or other appropriate ancillary process when the parties claimant and interpleading are all already parties to an action, properly pending before the Federal Courts, which otherwise have jurisdiction.

Among the numerous interpleaders are:

(1) TITLE SERVICE INTERPLEADER.

The first interpleader made by cross-claimant Title Service Company, made within a few days of the commencement of the action. This was a statutory interpleader under old Title 28, U. S. Code, Section 41(26), and included a bill in the nature of interpleader. It was made by a cross-claim. [R. 43.]

Appellant Ammann seized physical possession of several thousand notes, each secured by a separate deed of trust

upon a separate parcel of real property, the home of a borrower from the Association. [R. 47; 326-330.] Each note was secured by a separate deed of trust by which the borrower conveyed the legal title to his home to appellee Title Service Company as trustee, in favor of appellee Long Beach Federal as beneficiary. [R. 47; 326-330.] Appellant Ammann assigned and transferred many of these notes to appellant San Francisco Bank, notwithstanding which assignment, appellant Ammann accepted payment on account or in full from the borrowers on the notes and deeds of trust. [R. 3259]. Appellant Ammann delivered to appellee Title Service Company 174 notes and deeds of trust with a request that Title Service Company reconvey the title because said notes and deeds of trust were fully paid and discharged. The request for such reconveyances was executed only by appellant Ammann on behalf of Long Beach Association as conservator thereof. [R. 48.]

Appellant Ammann's authority to reconvey Long Beach Federal assets was unknown to Title Service Company and it made inquiry as to such authority. As a result of such inquiries, Title Service Company was immediately served as a defendant in the litigation by the Shareholders Protective Committee and was notified that the authority of Appellant Ammann to act for the Association was an issue in this litigation then pending in the Courts below. [R. 49.]

Appellee Title Service Company was further notified by the officers of said Association that if it reconveyed in reliance on Ammann's authority, it would be held individually liable for any loss resulting therefrom. [R. 49.]

Confronted with the conflicting demands of appellant Ammann demanding reconveyances on one hand and the Association and its shareholders denying Ammann's authority on the other, and being sued as a defendant in this federal court litigation, Title Service Company interplead into the registry of the federal court approximately 174 notes and deeds of trust. The notes were all payable at the offices of said Association in Long Beach, California, and the trust deeds conveyed the legal titles to 174 separate homes, situated within the district of the Court below, in Los Angeles, California, with an aggregate unpaid balance of approximately \$800,000.00. Such notes and trust deeds were physically deposited in the Registry of said United States District Court. [R. 43-56.]

Also interplead was the legal title to several thousand additional deeds of trust, likewise conveying thousands of separate parcels of real property situated in Los Angeles (and adjacent counties), California. By this interpleader, the titles to the homes of 8,000 homeowners whose notes aggregated, in unpaid balance, approximately \$12,000,000.00 were interplead into the custody and registry of the Court below. All of such thousands of parcels of real property and the homes thereon, are physically within the district of said United States District Court. [R. 43-56.]

The original conflicting claimants were, on one hand (1) appellee Title Service Company, a California corporation, a citizen of California [R. 43]; (2) the Share holder Members Protective Committee, citizens of the State of California [R. 2962]; representing the 16,000 depositors, whose savings were represented in part by said \$12,000,000.00 of loans of said notes and deeds of trust; and on the other hand, appellant-defendants, purported conserva-

tor, (3) Ammann a citizen of the District of Columbia [R. 7849] officially, and privately, of the State of Maryland [R. 7055]; (4) John H. Fahey, a citizen of the District of Columbia officially [R. 392], and privately of the State of Massachusetts. [R. 392.]

As said litigation progressed, Federal Home Loan Banks of (5) Los Angeles and (6) San Francisco, citizens of the State of California and (7) Federal Home Loan Bank of Portland, a citizen of the State of Oregon, defendants (8) William K. Divers, J. Alston Adams, and O. K. LaRoque, citizens of the District of Columbia [R. 4811] officially and, privately, citizens of their various respective domiciles, other than the State of California, to-wit: New Jersey, Ohio and North Carolina [R. 4812] (9) Federal Savings and Loan Insurance Corporation, a citizen of the District of Columbia, and various other claimants of various citizenships, all were made parties to the action.

Shortly thereafter, appellee Home Investment Company, made the first of 50 such interventions and interpleaders (a complete schedule of which is set forth as Footnote 15 to the Preliminary Injunction, the subject of these appeals [R. 8289]), by appropriate proceedings, motion, complaint in intervention, etc., and obtained orders of the Court below clearing the titles to the 174 homes involved. In such intervention and interpleader, appellee Home Investment Company caused to be deposited in the registry of the Court below approximately \$800,000.00 in cash. [R. 523.]

The 50 or more subsequent interpleader interventions followed a similar pattern. Motions for leave to intervene, complaints in intervention, order to show cause, culminated in an order issued by the Court below requiring deposit of the reconveyances, requests for recon-

veyances, notes, deeds of trust, etc., following which the intervention interpleader would cause to be deposited in the registry of the Court in cash the complete balance due and would obtain thereby a marketable title to his home.

The sum of approximately \$1,500,000.00 was interpleaded into the Registry of this Court by the approximately 50 separate interventions and interpleaders by the borrowers and homeowners thereby clearing title to approximately 400 homes together with the notes and deeds of trust deposited with the Clerk of the Court, pursuant to the approximately 50 orders of Court in connection with such interventions and interpleaders.

In various of such orders the Court found [R. 3137-3139]:

“It further appearing to the Court that neither said conservator alone, nor said Long Beach Federal Savings and Loan Association alone, nor any of the parties to this action can, without the aid and assistance of this Court, make, execute and deliver to said petitioners in intervention an effective release and discharge of the said real property described in said Complaint from the lien, encumbrance and obligation of said deed of trust securing said note in favor of said Long Beach Federal Savings and Loan Association, and it further appearing that grave and irreparable damage will be suffered by the Petitioners through being unable to clear the title to their said real property of the obligation of said notes and deeds of trust; and it further appearing that said petitioners . . . have offered to pay the amount due thereunder in full satisfaction thereof, but are in doubt as to who is entitled to receive such payments thereunder in order to secure a valid release and reconveyance and obtain a merchantable title to their said real property.

“And it further appearing that unless permitted to discharge said obligation and clear the title to said real property, Petitioners will sustain damage, and it further appearing that payment of the amount due thereunder into the Registry of this Court would be in aid of preserving the assets of said Association from further loss or damage, . . . that this litigation may continue for many additional months or even years, during which time irreparable damage will continue and increase to the detriment and harm of the Petitioners.

“And it further appearing that there are no abstractors in Los Angeles County, and abstracts of title are not a basis for establishment of merchantable title for real property, but rather by custom and usage those dealing with real property in Los Angeles County, California, demand and customarily receive policies of title insurance issued by Title Insurers, whose policies of title insurance have, therefore, become by usage and custom a virtually necessary element of a merchantable title for real property in Los Angeles County, thereby insuring that the title to said real property has been cleared and that the owner thereof has a merchantable title with the necessary policy of title insurance required by custom and usage.

“Now, therefore, the Court being fully advised in the premises grants said motion to intervene and accepts jurisdiction of said complaint in intervention and Petitioners are hereby made a party plaintiff in intervention in the above-entitled proceeding . . .”

Appellants in 1947-1948 took appeals to this Honorable Court of Appeals from several orders containing the findings above quoted. [R. 3152.] Appellants dismissed such appeals in 1948. [R. 3976.]

The wholesale assignments and transfers by appellant Ammann of the seized Long Beach Association deeds of trust to the San Francisco Bank in exchange for seized Los Angeles Bank assets, the collecting of payments after such assignments, the shareholders litigation challenging the seizure of the Association as fraudulent, all created conflicting claims which no reputable title company was willing to insure. Only by the exercise of interpleader jurisdiction and the deposit into the registry of the Court of the full amount on deposit was it possible for the borrowers to obtain an insurable marketable title to their homes. [R. 2393, 2519, 2561, 3136.]

WALLIS INTERPLEADER.

Another interpleader was that of a \$50,000.00 cashier's check given by said Association to its attorney, appellee Robert H. Wallis, for legal expenses for defense of the Association from confiscation, which check was deposited by attorney Wallis with the Registry of the Court in interpleader. [R. 86-100.]

The claimants to the check were, on one hand, (1) the appellee Long Beach Association, a citizen of the State of California [R. 88], (2) the plaintiffs in this action, the appellees Mallonee, *et al.*, Shareholder Members Protective Committee, citizens of the State of California, suing as representatives of the class of the entire sixteen thousand depositors in said Association. They claimed that said check was to be used for payment of legal expenses for defending said Association from confiscation and destruction. [R. 91, 92.]

(3) Appellee Robert H. Wallis, a citizen of California, attorney for said Association, likewise had claims for his own services rendered in the defense of said Association,

and as the litigation progressed, attorneys for other parties, litigating for the benefit of, and to protect said Association and its shareholders, likewise became entitled to claims upon the said \$50,000.00 cashier's check. [R. 92.]

The other claimants were (4) appellant Ammann as purported conservator of said Association and (5) appellant John H. Fahey, the one-man Federal Home Loan Bank Administration. Ammann, individually, was a citizen of Maryland and officially citizen of the District of Columbia, Fahey officially a citizen of the District of Columbia and individually a citizen of the State of Massachusetts.

Appellants (6) Home Loan Bank Board, Divers, Adams and LaRoque, members thereof, and their various subordinates and deputies, became other claimants, at various stages, of the litigation.

Appellants claimed that the Association must be completely defenseless after they seized it, that no assets could be used for the payment of expenses for the defense of the Association against their confiscation. When in 1947 the Court below made an allowance on account of such legal expenses for the defense of the Association, the defendants made the trial judge a defendant in the United States Supreme Court. It decided this matter against them and in favor of the power of the judge to make such allowances. (*Ex parte Fahey*, 332 U. S. 258.) Appellants also claimed that the appropriation of money for legal expenses for the defense of the Association against confiscation justified the seizure of said Association to prevent such appropriations for its defense. [App. Br. p. 60; R. 8218-8224, Ftn. 4.]

During the progress of this litigation there has been thus far allowed by the Court below as attorneys' fees,

costs and special master's fees of approximately \$500,000.00 ON ACCOUNT ONLY. Part of these allowances were unsuccessfully attacked in the United States Supreme Court and in the Ninth Circuit Court of Appeals. Appellants by express written waiver of right of appeal [R. 6547-6550] or by dismissal of appeals have consented to the payment of \$260,000.00 thereof [R. 3550-3552] and in addition have approved payment by appellant San Francisco Bank of an additional \$100,000.00.⁵ Who, among the parties and assets, is liable for payment of these and other expenses of litigation, is one of the issues yet pending for decision before said United States District Court.

GEORGE TURNER INTERPLEADER.

Another interpleader was by appellee George Turner.

The Association owns, in fee simple, a downtown hotel building, in part of which it maintains its offices and conducts its business. Part of this building was leased by said Association by written lease to appellee George Turner. [R. 3489-3491.]

Appellant Ammann, as purported conservator, immediately after his appointment, served written notice of cancellation and termination of said lease between the Association and said appellee Turner and demanded surrender of possession of the leased premises. [R. 3461-3491.]

The lease was for a term of twenty years and the tenant, appellee Turner, inquired of the officers and directors of said appellee Association and the appellee Shareholders

⁵See budget of appellant San Francisco Bank and approval of same by appellant Home Loan Bank Board. Exhibit on Appeal No. 12591.

Protective Committee (First original Plaintiffs in the Court below), as to what action he should take upon the demand of the said conservator for cancellation of the lease. The tenant was informed by them that litigation was pending in the United States District Courts for cancellation of such conservatorship as unconstitutional, invalid and fraudulent, and that said tenant would be held individually liable for any loss occasioned the Shareholders or the Association if he paid any rentals to the purported conservator or cancelled or surrendered said lease. [R. 3461-3491.] Said tenant thereafter took no action of any sort and impounded the rentals due under said lease for approximately twenty months until (on January 16, 1948), he and other defendants were sued in the California State Superior Court by Newendorp and Bradley, two only, of the 16,000 shareholders of said Association, who claimed to be suing on behalf of said Association for approximately \$2,000,000.00 in damages, cancellation and termination of said lease, and a receivership. [R. 9585-9645.]

The Association's business office and the hotel premises involved in said lease occupy the same building owned by said Association. [R. 7851-7855.] One day after the filing of said action (on January 17, 1948), the appellant Home Loan Bank Board rescinded the order appointing appellant Ammann as purported conservator of said Association, and seven days thereafter (on January 23, 1948), the Court below made its order removing said Ammann and his subordinates and deputies from the possession and operation of the Association's business and premises, notwithstanding which the receivership proceedings were vigorously pressed in the California State courts. [R. 9585-9644.]

Appellee Turner was also made defendant in the United States District Court litigation and thereafter deposited into the registry of the Court below, in interpleader, approximately \$18,000.00 in rentals accrued under the said lease and asked and obtained Federal Court preliminary injunction against proceedings in the California State Courts. He also asked (1) adjudication by the Court below of the validity of his lease of the premises owned by the Association, and the validity and effect of the attempts of appellants Ammann, *et al.*, to cancel said lease by their own notice, and (2) injunctions against any further proceedings in the State Court (or any other forum), for cancellation of the lease, or for damages against himself or other matters. [R. 3461-3491.]

Defendants in appellee Turner's cross-claims in these proceedings are the appellee Association, the appellees Shareholders Protective Committee, the Newendorp and Bradley, two individual shareholders who sued in State Court, appellants purported conservator, Home Loan Bank Board and its predecessors in interest, and all other parties to the litigation. [R. 3461-3491.]

The issues thus raised by such interpleader as to the possession and title of real estate owned by the Association and the validity of the lease and the rentals due thereon, are yet pending before the Court below undecided. They have been continued solely because of the negotiations for compromise of such litigation instituted by the appellant Home Loan Bank Board, which negotiations had continued for over a year and a half. [R. 8239, Ftn. 10; 8239, 8257, 8258, 8260, 8262.]

Said Court also required the deposit into the registry of said Court, of \$5,300,000.00 in United States Government Bonds and approximately \$8,500,000.00 (in unpaid balances due), of notes and deeds of trust, transferred to said appellant San Francisco Bank by the appellant Ammann as purported conservator of said Association. (The order of the Court below requiring such deposit is Exhibit "F" [R. 8399] of the Preliminary Injunction in this appeal.)

The parties to said interpleader thus were (1) the appellee Long Beach Association and (2) appellee Shareholders Protective Committee, denying liability upon \$6,300,000.00 of notes purportedly executed on its behalf by the appellant Ammann, its purported conservator; (3) appellee Los Angeles Bank, claiming that five-sixths ($5/6$) of said assets were the money and property of its stockholders (seized and confiscated from them by the defendants), and had been wrongfully used by said appellants in loans made to said appellant Ammann; and (4) the appellants Federal Home Loan Banks of (5) Portland and (6) of San Francisco (whichever exists), and (7) Home Loan Bank Board and Ammann, *et al.*; claiming that the \$6,300,000.00 in notes were the obligation of said Long Beach Association to said bank and that the stockholders of said Los Angeles Bank and said Bank itself, had no right, claims or ownership, in the said money and assets loaned on said notes and deeds of trust.

The citizenship of the parties to this interpleader was, (1) appellee Long Beach Federal Savings and Loan Association, a citizen of the State of California; (2) appellee Shareholders Protective Committee, citizens of California; (3) appellee Federal Home Loan Bank of Los Angeles and its stockholders, said bank being a citizen of the State of California and the said stockholders citi-

zens of the States of California, Nevada and Arizona; (4) the appellant Federal Home Loan Bank of Portland, a citizen of Oregon; (5) appellant the Federal Home Loan Bank of San Francisco, a citizen of California; (6) the appellants, purported conservator Ammann, officially a citizen of the District of Columbia and privately a citizen of the State of Maryland, together with the appellants (7) Home Loan Bank Board, officially citizens of the District of Columbia and individually citizens of Ohio and New Jersey.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION
INTERPLEADER.

Said appellee Association, for many years prior to its seizure, insured the accounts of its depositor shareholders with the appellant Federal Savings and Loan Insurance Corporation. [R. 6921.]

The only governing authority of said appellant Federal Savings and Loan Insurance Corporation is the appellants Home Loan Bank Board who are sole trustees of said Federal Savings and Loan Insurance Corporation (48 Stat. 1246, 12 U. S. C. 1724.) By various reorganization plans, appellant John H. Fahey, Federal Home Loan Bank Commissioner, became the sole trustee and only governing authority of said appellant Federal Savings and Loan Insurance Corporation. By subsequent reorganizations during the pendency of this litigation, the appellants Divers and Adams (and later the appellant LaRoque), became the sole trustees of said appellant Federal Savings and Loan Insurance Corporation and the only governing authority thereof. (Reorganization Plan No. 3 of 1947, 12 F. R. 4981.)

Premiums for the payment of such insurance are charged said appellee Association semi-annually and are

computed upon a sliding scale of percentages of the total outstanding liabilities of said Association, including the depositor-shareholder accounts, creditor obligations and other similar matters. [R. 6475.]

Bills for said insurance premiums rendered subsequent to the seizure of said Association and during the time it was in the possession and control of appellant Ammann as purported conservator thereof, computed such premiums by taking into account the purported borrowings of \$7,300,000.00 (later unpaid balance of \$6,300,000.00), made by said Ammann purportedly on behalf of said Association from said appellant San Francisco Bank. [R. 6475.]

The premiums thus computed were paid by the said appellant Ammann from the funds and assets of said appellee Association to his superior and principal, appellant John H. Fahey in Fahey's said capacity as sole trustee of said appellant Federal Savings and Loan Insurance Corporation. [R. 6475.]

After the removal of the said purported conservator by the order and judgment of the Court below in January of 1948, bills were rendered to said Association for payment of premiums for insurance of its accounts and liabilities by said Federal Savings and Loan Insurance Corporation, which bills included as an item chargeable thereon, premium upon the liability of \$6,300,000.00 denied by said Association to exist, but claimed by said appellant Home Loan Bank Board to have been incurred by said purported conservator Ammann for and on behalf of said Association. [R. 6475.]

The appellee Association was notified by its Shareholders Protective Committee (appellees), not to pay such bills thus erroneously computed and rendered; because to have

done so would, or might, have estopped said Association and said Shareholders Committee from ever contesting the validity of said obligation of \$6,300,000.00, the amount, validity and status of which were then pending issues in this litigation between said Shareholders, said Association and the said appellants Ammann, Fahey, the Home Loan Bank Board, San Francisco Bank and other interested parties. [R. 6476-6477.]

During the pendency of settlement negotiations, discussions were had between representatives of said appellee Association and members of said appellants Home Loan Bank Board, said Federal Savings and Loan Insurance Corporation and their subordinates and agents; and it was agreed that said Association would not make an immediate issue of the question of payment of such disputed premium and the said appellant Federal Savings and Loan Insurance Corporation and the said appellant Home Loan Bank Board would not urgently press the payment thereof in the hope that when said litigation was settled, this would not be further a subject of controversy between the parties.

Matters thus progressed during the pendency of settlement negotiations until in April of 1949, when pre-emptory demands were made by defendants upon said Association for the immediate payment of the total claimed amount of such premiums, including said erroneous computation based upon said purported \$6,300,000.00 loan, liability for which was denied by said Association. [R. 6475.]

Various threats were made as to “consequences” in case said Association did not pay the amount of such demanded premium regardless of its contention as to the validity thereof. Said Association was warned by appellees Mallonee, *et al.*, its Shareholders Protective Com-

mittee, representing the 16,000 depositor-shareholders, who are the actual owners of this mutual Association, that if the Association made any such payment contrary to the warnings of said Shareholders Protective Committee, and loss or harm thereby resulted to the interest of its shareholders, or the litigation was prejudiced, its officers and directors would be held individually liable and responsible therefor. [R. 6628-6638.]

Said Association thus faced with the conflicting demands on one hand by its shareholder depositors committee, citizens of the State of California and representing all of the 16,000 shareholder depositor members; and on the other hand the conflicting claims of said appellants Federal Savings and Loan Insurance Corporation, citizen of the District of Columbia, Ammann, a citizen of Maryland and of the District of Columbia, Home Loan Bank Board and its members, Divers, Adams and La-Roque, citizens of the States of Ohio, New Jersey and South Carolina respectively, made its motion on notice, before the Court below, and tendered deposit into the Registry of said Court of the total amount of said disputed premiums then due (April 16, 1949) amounting to approximately \$24,000.00.

Counsel for said appellants Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, *et al.*, opposed said motion before said Court below, notwithstanding which, such opposition was overruled, the motions granted and the deposits into the Registry of the Court below accepted. [R. 7098.] Subsequent installments of premiums became due during the pendency of the litigation and were similarly deposited into the registry of the Court on proceedings opposed by appellants. There is now on deposit in the registry of the Court below approximately \$59,000.00 so deposited. Counsel for the appellees

Shareholders Protective Committee have likewise joined said Association in the motions for deposit into the registry of the Court of the amounts of said disputed premiums.

As a result of some or all of the 50 to 60 separate interpleaders thus made during the approximately five years this litigation has been pending, the Court below acquired interpleader jurisdiction over all appellants and appellees. This jurisdiction was nationwide. The process of the Court below, including injunctions, summons, and other process, was by Title 28, U. S. C., Section 41(26), 231, Section 24(26), (as it now exists, Title 28 U. S. C., Sections 1335, 1397 and 2361), and by Rule 22, Federal Rules of Civil Procedure to be "served by the U. S. Marshals for the respective districts where the claimants reside or may be found."

On this basis alone, without the many other grounds, the preliminary injunction appealed from was within the statutory power and authority of the Court below. Appellants by their administrative hearing, were threatening to require the parties to litigate before appellants, the issues tendered and made in interpleader before the Court below.

A case affirming the nationwide scope of process and injunction in interpleader arose from an appeal of a decision of this Honorable Court of Appeals for the Ninth Circuit, decided by the United States Supreme Court in 1940. The case was:

Treinies v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85 (1940), (U. S. Supreme Court, 1940), (Affirming Court of Appeals for 9th Circuit).

Litigation had proceeded in two State Courts, one in the State of Washington and the other in the State of Idaho. The State Courts arrived at conflicting conclu-

sions as to ownership of several thousand shares of stock in the plaintiff Sunshine Mining Company.

The mining company, faced with conflicting judgments and litigation affecting the same stock, filed a new action in interpleader in the U. S. District Court in Idaho and obtained an injunction against further litigation in both State Courts. The U. S. Supreme Court, of its own motion raised the question of jurisdiction of the U. S. Court in interpleader and decided in favor of such jurisdiction.

The Supreme Court said:

“By the Act of January 20, 1936 (Old Title 28, U. S. C. Sec. 41, Sub. 26), the district courts have jurisdiction of suits in equity, interpleading two or more adverse claimants, instituted by complainants who have property of the requisite value claimed by citizens of different states. The suit may be maintained ‘although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another’ . . .” (Citation to Title 28 U. S. C. added.)

Appellants questioned the power of a Federal Court in Idaho to enjoin proceedings by a receiver in the State of Washington, before the Washington State Courts. In upholding such power in the Idaho Federal Court, the Supreme Court said:

“ . . . Process may run at least throughout all the states.”

“Neither are the provisions of Sec. 265 of the Judicial Code, 28 U. S. C. A. 379 applicable. That section forbids a United States court from staying proceedings in any state court. The Interpleader

Act, passed subsequently, however, authorizes the enjoining of parties to the interpleader from further prosecuting any suit in any state or United States court on account of the property involved. Such authority is essential to the protection of the interpleader jurisdiction and is a valid exercise of the judicial power." (Emphasis added.)

The parties to the appeal attempted to re-litigate the jurisdiction of the State Courts which had made final judgments determining such question of jurisdiction. In refusing to permit re-litigation of jurisdiction when the judgments of the State Court had become final, the Supreme Court said:

"One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." (Citing authorities.) (Emphasis added.)

The very broad powers of a court of equity to protect its interpleader jurisdiction, particularly to preserve the integrity of its final judgments from violation by a defeated litigant are shown in the case of:

Dugas v. American Surety Company, 81 L. Ed. 720, 300 U. S. 414 (U. S. Sup. Ct., 1937).

Interpleader action wherein surety company deposited total amount of bond in the U. S. Court, which entered judgment thereon determining liability of the surety company to defendant. The judgment enjoined any other State or Federal Court actions against the interpleading company. Defendant brought another action in the State Court against another and different surety company

on a different bond which nevertheless related to the same transaction, and upon which the interpleading surety company would eventually be liable for payment. The interpleading surety company filed a supplemental bill in its original interpleader action, setting forth the indirect method attempted by defendant, to evade the prior interpleader decree, and referring to the earlier judgment and injunction in interpleader of the Court.

The Court under its interpleader jurisdiction, promptly enjoined any further prosecution of the new State Court action. Defendant took this appeal to the Supreme Court challenging the jurisdiction of the District Court and particularly its power to enjoin proceedings against non-parties to the original interpleader action.

The Court found that the new State Court action against a different defendant was “in controvention of the spirit if not the letter of the decree in the interpleader suit.”

The United States Supreme Court affirmed the injunction and said (quoting the interpleader statute):

“‘Sec. 2 . . . Notwithstanding any provision of the Judicial Code to the contrary, said court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any other Federal court . . . until the further order of the court; which process and order of injunction shall be returnable at such time as the said court or a judge thereof shall determine and shall be addressed to and be served by the United States marshals for the respective districts wherein said claimants reside or may be found.’”

“Sec. 3. Said court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as may be suitable and proper, and issue all such customary writs as may be necessary or convenient to carry out and enforce the same.’”

“Plainly the court had jurisdiction of both the subject matter and the parties. No appeal was taken from either decree. Therefore Dugas was bound by both decrees . . . But these rulings were all made in the exercise of the court’s jurisdiction, were subject to challenge and re-examination only on appeal, and became conclusive on him in the absence of an appeal.”

“The jurisdiction to entertain the supplemental bill is free from doubt. Such a bill may be brought in a Federal court in aid of and to effectuate its prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect, but subject to the qualification that the relief be not of a different kind or on a different principle. Such a bill is ancillary and dependent, and therefore the jurisdiction follows that of the original suit, regardless of the citizenship of the parties to the bill or the amount in controversy.

“6. The power of the court to enjoin Dugas from further prosecuting his suit in the state court on the appeal bond has full support in §§2 and 3 of the Interpleader Act of 1926 before quoted, as also in settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees.” (Emphasis added.)

Interpleader by cross-claim in an otherwise doubtful class action, was upheld as an absolute right which could not be denied, even in the discretion of a District Court in the case of:

Railway Express v. Jones, 106 F. 2d 341 (C. C. A. 7, 1939).

Plaintiff filed a class action for himself and others against Railway Express and others to recover \$24,000.00 of which plaintiff and his class had been defrauded by other defendants. Each of the victims of the fraud had lost less than \$500.00, but the aggregate of all the losses was \$24,000.00. The Collector of Internal Revenue appeared in the action and claimed a lien on the \$24,000.00 for income tax due from one of the perpetrators of the fraud. Defendant Railway Express moved in the District Court to be allowed to interplead by a counter-claim. The District Court denied the motion, the Court of Appeals, Seventh Circuit, reversed, saying (at p. 344):

“Where the possessor of funds can establish the essential and jurisdictional facts prescribed in the statute, his right to relief under this section (41(26)) is absolute. . . .”

and at page 345:

“By proceeding under the counterclaim of the Railway Express the jurisdiction of the court will be unassailable, and the claims of all claimants may be litigated exactly the same as in a proper class suit.

“It therefore follows that as a matter of wise discretion, *as well as of recognizing a right which*

the railway express possessed absolutely, the court should, after the counterclaim was filed, have proceeded as provided for by the interpleader statute." (Emphasis added.)

Regardless of any other jurisdiction, Title Service Company's interpleader (a matter of "absolute right") establishes the jurisdiction of the Court below to proceed with the entire class action. Subsequent decisions on constitutionality could not affect the jurisdiction of the Court below as is demonstrated by the case of:

Mallors v. Equitable Life, 87 F. 2d 233 (C. C. A. 7, 1936).

Appeal from interlocutory decree discharging interpleader insurance company. Interpleader was a New York corporation. All claimants citizens of Illinois. Appellants claim lack of diversity prevents interpleader jurisdiction. In affirming jurisdiction in interpleader, the Court of Appeals, Seventh Circuit, said:

" . . . This criticism is on the assumption that the insurance company is not a real party to the litigation. But such assumption is unfounded. It is true, the insurance company concedes a liability for the full amount due upon its contracts. It does not, however, concede liability to each of the defendants for the full amount. . . . Inasmuch as it seeks to avoid a double liability, the insurance company is a real party in interest.

"Like many another law suit, when the pleadings are settled and the trial is over, some of the controverted issues cease to controverted . . .

"As a real adverse party to the beneficiaries named in the policies and to those who assert that they are

beneficiaries the insurance company is permitted to bring this suit in the Federal court upon a showing that its domicile is New York, and the domicile of all the claimants is Illinois.

“(4) Subsequent disposition of some of the issues by the court before judgment cannot oust the Federal court of jurisdiction any more than a change of residence of one or more of the parties after suit is begun in the Federal court may accomplish such a result.”

“. . . The institution of this interpleader suit by the insurance company has made the Federal District Court the forum wherein the controversies must be determined. The District Court must determine the issues which go to the merits of the claims of the contending parties.”

Removal of appellant Ammann as conservator could have no effect on the jurisdiction of the Court below in interpleader or otherwise, because as above stated:

“. . . disposition of some of the issues by the court before judgment cannot oust the Federal court of jurisdiction. . . .”

This Honorable Court of Appeals for the Ninth Circuit, less than four years ago upheld interpleader jurisdiction entirely independent of the interpleader statutes, and held diversity of citizenship among the various claimants unnecessary to the jurisdiction of the District Court, in the case of:

Rossetti v. Hill, 162 F. 2d 892 (C. C. A. 9, 1947).

“The question of jurisdiction is raised by the appellees on petition for rehearing on the ground that

Section 2, Article III, of the United States Constitution and the Judicial Code, Section 24, 28 U. S. C. A. §41, do not give jurisdiction to the federal district court in an interpleader action where all claimants to the fund are residents of the same state.”

“It seems clear that the reason for the interpleader is not negated by the fact that the claimants to the fund all reside in the same state. The usefulness of the proceeding is in the protection of the party against conflicting claims. Jurisdiction is laid by the allegations of the complaint. The complaint in this case is that the complainant is a party to a controversy which cannot be settled by any single action against it and cannot be settled by any action of its own without double payment. The controversy is settled by the sensible process of bringing all parties into one court proceeding.

“. . . The Security Trust case, *supra*, and the Mallers case, *supra*, both containing the same fact situation as the instant case hold that the jurisdictional requirements are met under 28 U. S. C. A. §41(1). The Interpleader Act, 28 U. S. C. A. §41(26) did not abrogate the right to bring interpleader suits in the federal courts under 28 U. S. C. A. §41(1); that is, the interpleader statute was intended to afford a remedy in situations where interpleader had previously been unavailable. The conclusion drawn was that the statute being remedial, it supplements rather than supplants the earlier statute. Thus, an interpleader suit may be brought in a federal court where the interpleader’s domicile differs from the claimants who are domiciled in another state. 28 U. S. C. A. §41(1).

“The petition for rehearing is denied.”

In 1937, this Honorable Court of Appeals had likewise held that diversity between the claimants was not required, in the case of :

Security Bank v. Walsh, 91 F. 2d 481 (C. C. A. 9, 1937).

Plaintiffs in interpleader, a British corporation, sues conflicting claimants, all citizens of California.

Objection is made to the jurisdiction. This Honorable Court of Appeals for the Ninth Circuit held jurisdiction existed notwithstanding lack of diversity and said on page 483:

“Jurisdiction in this case is not conferred by the Interpleader Act of January 20, 1936 (28 U. S. C. A. §41(26)). That act gives jurisdiction of suits in equity begun by bills of interpleader only where two or more adverse claimants, citizens of different states, are claiming the fund or property deposited in the registry of the court. Here the adverse claimants are all citizens of California. However, the complainant in interpleader is a British corporation, and the amount in controversy exceeds \$3,000. The jurisdictional requirements are thus met under the Act of September 24, 1789 (as amended), R. S. §563 (as amended), 28 U. S. C. A. §41(1), unless the Interpleader Act of 1936 was intended to be exclusive and to circumscribe the provisions of the more general statute.

“It seems clear that it was not the intent of the interpleader act, in its original or amended form, to abrogate the right to bring suits in interpleader in the federal courts under the general provisions of 28 U. S. C. A. §41(1). That right had long been exercised . . . (citing authorities). Rather, the

statute was intended to afford a remedy in situations where interpleader had theretofore been unavailable because of the impossibility of haling before a court claimants residing beyond its territorial jurisdiction. . . . (Citing authorities.)

“Accordingly, we hold that the lower court had jurisdiction to entertain the interpleader suit under the general power conferred by 28 U. S. C. A. §41(1).”

That the jurisdiction of a Federal Court in interpleader is exclusive and prevents any other tribunal from adjudicating as to the interplead assets is illustrated by the case of:

Cramer v. Phoenix, etc., 91 F. 2d 141 (C. C. A. 8, 1937).

In affirming interpleader jurisdiction, the Circuit court said:

“It is elementary that where one court takes jurisdiction of a specific thing, the *res* is as much withdrawn from the judicial power of another as if it had been removed to a different territorial sovereignty. The tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted.

. . .

“. . . It appears that the proceeds of the two policies were deposited in the registry of the lower court. In these circumstances that court had exclusive jurisdiction and power to hear and determine all questions respecting title, possession, and control of them. . . .”

The right of an interpleading plaintiff to join declaratory relief with interpleader, and require all parties to

litigate all claims before the one court, notwithstanding other prior pending litigation in other courts, is illustrated by the case of:

Maryland Casualty Co. v. Glassell-Taylor, 156 F. 2d 519 (C. C. A. 5, 1946).

Action by bill in the nature of interpleader and complaint for declaratory relief. Plaintiff had issued surety bond for \$595,000.00 guaranteeing completion of a housing project.

Plaintiff denied all liability to all defendants and by its complaint alleged that there were pending four prior separate court actions in other courts against it, for amounts varying from \$1,000,000.00 to several thousand dollars, and further alleged five other claims which had not yet resulted in court action. Objection was made by defendants to the jurisdiction of the Federal Court and the District Court dismissed because of adequacy of remedies in the prior pending Federal and State Court actions.

The Court of Appeals, Fifth Circuit, reversed and said at page 523:

“(5-7) We think the lower Court was in error in dismissing the complaint. It stated a cause of action under: (a) the Interpleader Statute; (b) the Rules of Civil Procedure; and (c) the Declaratory Judgment Statute. The Court had jurisdiction of the parties and of the subject matter in all three of these aspects. . . .

“. . . The Federal Interpleader Statute and Rule 22, Federal Rules of Civil Procedure, were not designed merely to prevent a multiplicity of suits and to protect the stakeholder from multiple liability, but they were also intended to require all interested

parties to come in and set up their claims in one case . . . The Interpleader Statute was also designed to afford a means of process by which claimants to a fund, who live in other states, may be called in and required to litigate in one court to the end that all claimants to the fund, as well as the holder of the fund, may be given protection.

“(10) We consider it important that the usefulness of the statutory remedy of interpleader, which has been greatly enlarged by the Interpleader Act of 1936 and by Rule 22 of the Federal Rules of Civil Procedure, should not be impaired by narrow and restrictive rulings. In such cases where jurisdiction clearly appears, Federal District Courts do not have the right to decline to exercise that jurisdiction . . .”

The distinction between necessary allegations in a bill in the nature of interpleader and one in strict interpleader as well as that diversity of citizenship is not required is shown by the case of:

Hunter v. Federal Life Ins. Co., 111 F. 2d 551
(C. C. A. 8, 1940).

Page 555:

“The appellant’s first contention is that the court below was without jurisdiction, because diversity of citizenship did not exist, the claimants all being citizens of Arkansas, and the plaintiff being a nominal party . . .

“. . . we think that the right of a stakeholder to be relieved of vexation, the danger of multiple liability, and the responsibility of undertaking to decide, at his peril, which of two or more adverse claimants is entitled to money or property in his

hands, has the effect of making him a real party in interest. In this case the plaintiff's right to maintain this suit was controverted, and the appellant sought to subject the plaintiff to penalties and attorney's fees under the statutes of Arkansas. There was nothing unreal about the plaintiff's controversy with the appellant with respect to its right to resort to interpleader. We think that the requisite diversity of citizenship was present.

“(2) The appellant also contends that the plaintiff's bill does not contain all of the essential elements of a strict bill of interpleader in that it does not aver that there are two or more claimants in existence capable of interpleading and claiming a right to the proceeds of the policy, and in that the bill does not contain an averment that the plaintiff claims no interest in the proceeds of the policy or stands perfectly indifferent between the adverse claimants.

“It would serve no useful purpose to discuss the sufficiency of the averments of the bill as a strict bill of interpleader, since it was clearly sufficient as a bill in the nature of interpleader, which may be maintained by one who is not a mere stakeholder. (Citing authorities.) . . .

“The jurisdiction of a federal court to entertain a bill of interpleader is not dependent upon the merits of the claims of the defendants. Metropolitan Life Ins. Co. v. Segartis, D. C., 20 F. Supp. 739. It is our opinion that a stakeholder, acting in good faith, may maintain a suit in interpleader for the purpose of ridding himself of the vexation and expense of resisting adverse claims, even though he believes that only one of them is meritorious . . .” (Emphasis added.)

The question of jurisdiction was so important that all of the justices of the Fifth Circuit considered, in bank, the case of:

U. S. v. Sentinel Insurance, 178 F. 2d 217 (C. C. A. 5, 1949).

In bank with all justices because of jurisdictional question.

Seven fire insurance companies commenced interpleader against Collector of Internal Revenue, federal receivers and various other claimants. Appellants maintained that because some of the claimants were of the same citizenship as others, interpleader jurisdiction was thereby defeated.

C. C. A. 5, said:

“(6) We hold, however, that even if the plaintiffs in the interpleader suit had been dismissed before final decree and had gone out of the case, the requirement of the statute would be met if there were two or more claimants who were citizens of different states regardless of how many claimants there might be who were citizens of the same state with other claimants. We think this question has been settled by two decisions of this Court. In *Dugas v. American Surety Co.*, 5 Cir., 82 F. 2d 953, we said: ‘Some of the claimants now are, and at all times mentioned in the bill were, citizens of named states other than Louisiana, and some of these claimants now are, and at all times mentioned in the bill were, citizens of the state of Louisiana.’ And, so saying, held that there was jurisdiction of the interpleader suit. On appeal, 300 U. S. 414, text 425, 57 S. Ct. 515, 519, 81 L. Ed. 720, the Supreme Court said: ‘Plainly the court had jurisdiction of both the subject-matter and the parties.’

“(7) If in the face of these decisions we were in any doubt that Congress, in the enactment of the Federal Interpleader Statute—which was designed to bring into one court all of the claimants to a particular fund so that it could be equitably divided among all rather than being a race to the swift—, intended so to restrict the statute that there could be only one claimant to the fund per state, that doubt would be put at rest by subsection (b) of the Federal Interpleader Act of 1936, under which this case was filed and tried, which, in defining the venue of interpleader suits, provides: ‘(b) Such a suit may be brought in the district court of the district in which one or more of such claimants resides or reside.’ (Emphasis added) for it is obvious that if there could be only one adverse claimant per state there certainly could not be more than one of such claimants in any court district, since federal court districts do not extend across state boundaries.

“The relief sought by the plaintiffs was the prevention of double liability and a multiplicity of suits as designed by the Act . . .

“(8) Thus it appears that the suit falls squarely within the Federal Interpleader Statute and the Court below was not without the jurisdiction conferred thereby.”

Dismissal of cross-claims in interpleader action prior to hearing on the merits was reversed in:

Publicity, etc. v. Collector Internal Revenue, 139 F. 2d 583, C. C. A. 8 (1943).

Appeal from order dismissing cross-claim in interpleader action.

An insurance company confronted with the conflict claims of the beneficiaries of its policies on the one hand

and the collector of internal revenue asserting income tax liens and rights on the other hand, interplead the surrender value of the policies into the District Court.

Various creditors of the beneficiaries under the policies filed their cross-claims.

One of the beneficiaries, after a "conference" with the U. S. Attorney representing the Collector of Internal Revenue, withdrew his claims to the funds in court. Whereupon the trial court dismissed all cross-claims and awarded the funds to the Collector, to the exclusion of the creditors. The creditors appealed and the Court reversed, saying:

"(1) This Court has repeatedly said that a motion to dismiss a complaint should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim . . . (Citing authorities.)

"Rule 22(2) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c, provides that actions brought under §24(26) of the Judicial Code as amended, Title 28 U. S. C. A., §41(26), shall be conducted in accordance with those Rules. The Federal Rules of Civil Procedure do not sanction the disposition of doubtful issues of fact or law upon motions to dismiss for insufficiency of pleadings. The Rules contemplate a determination of all such issues by the trial court after a hearing, and that the trial court shall make findings of fact and conclusions of law, to the end that the parties to the litigation and the reviewing court may know the exact factual and legal basis for the trial courts' decision . . ."

“(4) While we shall not, upon this appeal, express any opinion as to the merits of this case, we consider it important that the usefulness of the statutory remedy of interpleader, which has been greatly liberalized by the Interpleader Act of 1936 and by Rule 22 of the Federal Rules of Civil Procedure, shall not be impaired by narrow and restrictive rulings which might prevent bona fide claimants, with meritorious claims to a fund deposited by a stakeholder, from securing an adjudication of their rights. . . .” (Emphasis added.)

Interpleader of leases and other incidents of real property was upheld in the case of:

Pure Oil Co. v. Ross, 170 F. 2d 651, C. C. A. 7 (1948).

Appeal from order refusing to permit intervention in interpleader action. Reversed.

C. C. A. 7 said at page 652:

“ . . . The controversy involves the title to real estate in Richland County, Illinois, and the fund represents the purchase price of a portion of the oil and gas from two oil and gas leases”

“At the outset we are met with the contention that the intervening petition should have been dismissed because both Schiff and Scott are residents of New York.

“(2) It will be enough to say that a complaint interpleading one group of claimants, all of whom are citizens of Illinois, and another group claiming adversely, all of whom are citizens of various States,

satisfies the requirements of the Interpleader Act, since the Act requires diversity only as between the claimants . . . (Citing authorities.)” (Emphasis added.)

CONCLUSION RE INTERPLEADER.

The jurisdiction of the court below to adjudicate all issues attached upon the filing of the first valid cross-claim in interpleader, in addition to its jurisdiction under the original complaint. The fifty to sixty successive interpleaders, have interlaced jurisdiction among all of the parties to the litigation regardless of their residence or domicile.

When that jurisdiction was flouted by the appellees Home Loan Bank Board attempting to appoint themselves receivers for the successful litigants, thereby to determine title and possession of the assets in the exclusive jurisdiction of the Federal Court in its registry, the Court had no choice; it could abdicate its constitutional authority and permit the defeated litigants to vacate the final judgment of the court below and thereby acquiesce in appellants usurping the authority of this Court of Appeals, or it could preserve the respect due the entire judicial structure, including the District Court, this Court of Appeals, and the U. S. Supreme Court, and enjoin the defeated litigants from vacating a final U. S. Court judgment.

That the injunction was only preliminary, speaks for the moderation of the court below. Many courts, much less provoked than the court below, have punished as summary contempt, an attempt by one of the litigants to violate a final judgment of the Court.

FORMER JUDGMENTS AND ORDERS.

By former judgments and orders, the Court has expressly and impliedly held that it has jurisdiction over appellants, and all other parties, and over the subject matter of the actions.

(1) Appellants have dismissed previous appeals from judgments containing the express findings that the Court has jurisdiction over the parties and the subject matter.

(2) Appellants have failed to appeal from judgments containing the express finding that the Court has jurisdiction over parties and the subject matter.

(3) In many orders and judgments, the Court has impliedly exercised jurisdiction over appellants and the subject matter.

(4) All of the foregoing judgments and orders (1) to (3) have become final, are *res adjudicata*, and the law of this case.

Jurisdiction of the subject matter and jurisdiction of the parties have been the subject of appeals, writs, motions to dismiss, motions to quash and every possible attack by appellants. Notwithstanding these attacks, jurisdiction of the court below has been sustained and upheld in six appeals and writs taken by appellants and decided against them. Jurisdiction of the court below has never been denied by any appellate court in this litigation.

Appellants' predecessors in the first appeal to the U. S. Supreme Court urged dismissal of the entire action including cross-claims, third party complaints, etc.

The U. S. Supreme Court in the 1947 appeal (332 U. S. 245, 91 L. Ed. 2030, said:

“ . . . Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies . . .

“It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are like undetermined by the courts below, and we make no determination or intimation concerning the merits of these issues or as to other remedies or relief than that in the judgment before us.”

The Mandate from the Supreme Court [R. 2304] reads:

“And It Is Further Ordered that this cause be, and the same is hereby, remanded to said District Court for proceedings in conformity with the opinion of this Court.”

Appellants' efforts to secure dismissal in the Supreme Court failed. Their application for a writ of prohibition met a similar fate. In *Ex parte Fahey*, 332 U. S. 258, 259, 91 L. Ed. 2041 (1947), the Supreme Court said:

“Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him”

Private litigants have sought the same objectives here undertaken by appellants. That is, to lose the issue of jurisdiction by final judgments of the courts below and thereafter to seek avoidance of such judgments against them. The U. S. Supreme Court has uniformly, in many decisions, held that once the court below has determined its jurisdiction by a final judgment, the losing parties cannot thereafter attack such jurisdiction even though the judgment of the court below was erroneous and notwithstanding the attack on jurisdiction involved jurisdiction of the subject matter. A case illustrating this point is:

Stoll v. Gottlieb, 305 U. S. 165, 83 L. Ed. 104 (1938).

Plaintiffs sued defendants upon a guaranty of a bond issue. The corporation which had issued the bonds went through bankruptcy and a 77(b) reorganization by the U. S. District Court. In that proceeding notice was given to plaintiffs of a plan for cancellation of the guaranty. Plaintiffs did not appear at the hearing and the plan of reorganization which provided for extinction of plaintiffs' guaranties against the defendants, was, over the objection of others of the same class as plaintiffs, confirmed by the U. S. District Court. The judgment of the District Court was executed by the transfer of the assets and the cancellation of the guaranties. The plaintiffs filed a petition in the U. S. District Court proceeding praying vacation or modification of the order cancelling his guaranty on the ground that the District Court in proceedings for reorganization did not have power or jurisdiction to cancel the guaranty. An order was entered denying this petition. No appeal was ever taken therefrom.

Notwithstanding this action by the U. S. Court, plaintiffs sued in the state courts upon the cancelled guaranty. Defendants plead the judgment of the U. S. District Court, in the reorganization, cancelling the guaranty. Plaintiffs claimed that the U. S. Court was without jurisdiction to cancel the guaranty and therefore plaintiffs could yet recover in the state courts. Supreme Court of Illinois affirmed a judgment enforcing the cancelled guaranty and the U. S. Supreme Court reversed, holding the question of jurisdiction of the U. S. Court had been decided by that court, that no appeal had been taken from such decision, and right or wrong, the judgment was final. The Supreme Court said at page 170:

“ . . . But where the judgment or decree of the Federal court determines a right under a Federal statute, that decision is ‘final until reversed in an appellate court or modified or set aside in the court of its rendition.’ As this plea was based upon an adjudication under the reorganization provisions of the Bankruptcy Act, effect as *res judicata* is to be given the Federal order, if it is concluded it was an effective judgment in the court of its rendition . . . In this particular case, a federal question was involved. This was the power of the Federal courts to protect those who come before them relying upon constitutional rights or rights given, as in this case, through a statute enacted pursuant to constitutional grants of power. . . .

. . . There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. Where adversary parties appear, a court must have

the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. . . . After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

“Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.” (Emphasis added.) (Many earlier U. S. Supreme Court decisions to the same effect are discussed at length.)

In affirming this Honorable Court of Appeals for the Ninth Circuit in its holding that jurisdiction of the subject

matter and parties once decided was not to be relitigated the United States Supreme Court decided the case of:

Treinies v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85 (1940) (U. S. Supreme Court—1940) (Affirming Court of Appeals for Ninth Circuit), 99 F. 2d 651.

The parties to the appeal attempted to relitigate the jurisdiction of the state court which had made a final judgment determining such question of jurisdiction. In refusing to permit relitigation of jurisdiction when the judgments of the state court had become final, the Supreme Court said:

“One trial of an issue is enough. ‘The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,’ as well to jurisdiction of the subject matter as of the parties.” (Emphasis added.) (Citing authorities.)

The U. S. Supreme Court said in *Stoll v. Gottlieb*, *supra*, every court rendering a judgment tacitly if not expressly determines its jurisdiction over the parties and the subject matter.

The Court below in our present litigation in 1947 made the following finding:

“That the court has jurisdiction of the persons and subject matter involved.” [R. 2354.]

This proposed finding went before the U. S. Supreme Court on the writ of mandamus and/or prohibition and/or

injunction sought by appellant Fahey in 1947. The writ was denied by the U. S. Supreme Court in *Ex Parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041 (1947).

Out of deference to the U. S. Supreme Court the District Court had not signed the proposed finding during the pendency of the writ. [R. 1448, 1450.] After the denial of the writ and the spreading of the mandate from the U. S. Supreme Court in September of 1947 [R. 2302], the District Court signed the findings of fact including the finding "that the court has jurisdiction of the persons and subject matter involved." [R. 2354, 2363.]

Appellants immediately appealed to this Honorable Court of Appeals from the judgment containing such findings and sought a stay of execution of said judgment. [R. 2423, 2440.] The Appeal was No. 11751 before this Honorable U. S. Court of Appeals for the Ninth Circuit.

Printed briefs were filed by appellants and appellees and the matter was argued before this court of appeals. The stay of execution was denied. [R. 2959.]

In the face of this finding, tested by a writ before the U. S. Supreme Court, and a denial of a stay by this Honorable Court of Appeals, appellants dismissed their prior appeal to this Court attacking the finding "that the court had jurisdiction of the persons and the subject matter involved." [R. 3550.] Such finding therefor became final and the law of this case.

The phrase used by the court below in finding that it had "jurisdiction of the subject matter and the parties in-

volved,” was not accidental but was the exact language used by the U. S. Supreme Court in the leading case of:

Dugas v. American Surety Co., 300 U. S. 414, 81
L. Ed. 727, U. S. Supreme Court—1936,

when on page 425 of the U. S. Reports, in disposing of attack on interpleader jurisdiction of the court below, the Supreme Court said:

“Plainly the court had jurisdiction of both the subject matter and the parties. . . .”

further, the Supreme Court said on the same page:

“. . . No appeal was taken from either decree. Therefore Dugas was bound by both decrees. Had he exercised his right to appeal he could have obtained a review of the rulings on his objection to being brought into the suit. . . . But these rulings were all made in the exercise of the court’s jurisdiction, were subject to challenge and re-examination only on appeal, and became conclusive on him in the absence of an appeal.” (Emphasis added.)

An appeal taken and dismissed of course has the same or greater finality than never taking an appeal.

The appellants prosecuting the writ through the U. S. Supreme Court and dismissing the prior appeals to this Court of Appeals are the only parties who could claim to be either immune from suit or indispensable. That is Fahey, the one-man “Home Loan Bank Board” and his appointee Ammann, appellants, successors in office to said

Fahey duly substituted as such by final orders of substitution of the District Court, after notice and opportunity to object, from which orders of substitution no appeals have ever been taken [R. 4547], are bound and forever precluded by the law of this case, and by *res adjudicata* "that the court below has jurisdiction of the persons and subject matter involved."

As was so aptly said by the Supreme Court in the *Gottlieb* case (*supra*):

" . . . It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retires the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

Appellants and their predecessors have had their day (actually their five years) in court. They have litigated the question of jurisdiction and lost in 1947 in the U. S. Supreme Court *Ex Parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041 (1947); in 1948 in Appeals No. 11751 and 11867 in this Honorable Court of Appeals; in 1950 by their petitions for writ of prohibition, mandamus or other appropriate writ, presented in February, 1950, denied by this Court June 1, 1950 (no number assigned).

They have likewise litigated and lost the questions of jurisdiction at many of the approximately 100 hearings before the District Court.

Another case illustrating the power of a Court to make a final decision as to its jurisdiction over the parties and the subject matter is:

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231: U. S. Supreme Court—1932 (an appeal from Court of Appeals Ninth Circuit).

Appellant surety company executed an appeal bond in litigation then pending in the Idaho State Courts. The judgment upon which the stay bond was given was affirmed and without notice to the surety company, a judgment was entered against it in the state trial court. The surety company moved in the state trial court to vacate the judgment against it and thereby submitted to the state trial court for decision the question of the jurisdiction of that court to enter judgment against the surety company without notice. Proceedings resulted in a judgment that the state court did have jurisdiction over the surety company. The surety company then filed a new action in the U. S. District Court in Idaho seeking to enjoin the Idaho State Court from enforcing the judgment against the surety company. The United States District Court in Idaho denied the injunction and dismissed the action. This Honorable Court of Appeals for the Ninth Circuit reversed the U. S. District Court and held the injunction should have been granted. The U. S. Supreme Court on appeal from both the Idaho state proceedings and the U. S. District Court proceedings held that by sub-

mitting a motion to vacate before the Idaho state court, the surety company had submitted to that Court for decision the question of jurisdiction over the parties and subject matter and that the decision of the Idaho courts on that subject was final, and not open to litigation.

The United States Supreme Court said:

“ . . . For the federal remedy was barred by the proceedings taken in the state court which ripened into a final judgment constituting res judicata.”
(Emphasis added.)

“ . . . But an adequate state remedy was available; and having invoked that and pursued it to final judgment, the Surety Company cannot escape the effect of the adjudication there. (Citing authorities.)”

“The Supreme Court of Idaho had jurisdiction over the parties and of the subject matter in order to determine whether the trial court had jurisdiction. Clearly, the motion to vacate, made on a general appearance, and the appeal from the order thereon, were no less effective to confer jurisdiction for that purpose than were the special appearance and motion to quash and dismiss held sufficient in Baldwin v. Iowa State Travelling Men’s Asso., 283 U. S. 522, 75 L. Ed. 1244, 51 S. Ct. 517. And there was an actual adjudication in the state court of the question of the jurisdiction of the trial court to enter judgment. The scope of the issues presented involved an adjudication of that issue. (Citing authorities.)”

JURISDICTION—POWER OF COURT TO DETERMINE ITS
OWN JURISDICTION.

Appellants contends that the service of process upon their predecessor in Washington, D. C. by the U. S. Marshal under authority of various orders of the District Court authorizing such service, is invalid.

They presented these points by motions to quash such service and by motions to dismiss. [R. 391, 810.] These motions were decided against them by the court below. [R. 752.] On their previous appeals in 1946, 1947 and 1948 they raised these same questions of lack of jurisdiction, inadequacy of service, etc. They now seek on these present series of appeals in 1950 to relitigate the questions decided adversely to them in 1947 by the United States Supreme Court and by this United States Court of Appeals, Ninth Circuit.

That they cannot do so is held by the case of:

Baldwin v. Iowa Travelling Men, Etc., 283 U. S. 522, 75 L. Ed. 1244 (1931).

Plaintiff sued in Missouri State Court, action was removed to United States District Court in Missouri. Defendant corporation appeared specially in the United States District Court in Missouri and moved to dismiss for inadequacy of service. Motion to quash service of summons was granted but dismissal was refused. Alias summons was issued and defendant again appeared specially and the question of jurisdiction of the District Court in Missouri, over the non-resident corporation, was submitted on motions, affidavits and briefs. The Court held it had jurisdiction and ordered non-resident defendant corporation to answer, which it declined to do and judgment was en-

tered against it. No appeal or other review from such judgment was ever sought. Plaintiff then brought action in the District Court in Iowa based upon the judgment of the District Court in Missouri. Defendant corporation defended upon lack of jurisdiction over it by the District Court in Missouri. Trial Court sustained the defense and dismissed the action. C. C. A. 8 affirmed the dismissal. Supreme Court reversed and held that the decision of the District Court in Missouri on the question of jurisdiction was conclusive and not subject to attack after it became final. The Supreme Court said:

“The ground of the motion made in the first suit is the same as that relied on as a defense to this one, namely, that the respondent is an Iowa corporation, that it never was present in Missouri, and that the person served with process in the latter state was not such an agent that service on him constituted a service on the corporation. . . .”

“. . . The respondent, on the other hand, insists that to deprive it of the defense which it made in the court below, of lack of jurisdiction over it by the Missouri district court, would be to deny the due process guaranteed by the 14th Amendment; but there is involved in that doctrine no right to litigate the same question twice. (Citing authorities.) . . .

“The substantial matter for determination is whether the judgment amounts to *res judicata* on the question of the jurisdiction of the court which rendered it over the person of the respondent. It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. . . . The special appearance gives point

to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. . . .

In our own case, appellants, Fahey, Divers, *et al.*, had the election not to appear at all. They could have defaulted the proceedings in the court below. Had they done so, they would not have submitted to the court below by their special appearance, the question of the jurisdiction of that Court over their persons and over the subject matter of litigation. Instead of this, they appeared specially and in 1946 and 1947 raised the issues of jurisdiction. The District Court decided these issues against them and found "that the Court has jurisdiction of the persons and subject matter involved." [R. 2354.] Appellants in the courts below and in their points on appeal and specifications of error in prior appeals had raised the questions of jurisdiction over their persons and over the subject matter.

By the dismissal of these appeals, appellants conceded the jurisdiction of the District Court over both their persons and the subject matter, and such holdings of the District Court became *res judicata* and law of this case. As was said in the *Baldwin v. Iowa Travelling* case, *supra*:

" . . . It had also the right to appeal from the decision of the Missouri District Court. . . . It elected to follow neither of those courses, but after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that

matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

Appellants undertook by special appearances to submit to the District Court below for decision the question of that court's jurisdiction over them and over the subject matter of the litigation. That Court has decided these questions adversely to appellants. [R. 2354.] Appellants in 1946, 1947 and 1948, appealed from such adverse decisions on the question of jurisdiction and have likewise tried out these issues on writs of prohibition, mandamus injunction, etc., both before United States Supreme Court and in this Honorable Court of Appeals for the Ninth Circuit. [R. 3550, 3976.] Appellants cannot relitigate these questions foerever. They have been before every Court available to them on the questions of jurisdiction of their persons and the subject matter. These issues at least, are forever settled and *res judicata* as between these appellants and present appellees.

As was said so aptly in *Baldwin v. Iowa Travelling Men, etc.*:

"The special appearance gives point to the fact that the respondent entered the . . . Court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all."

Even if the statute under which the Court makes its decision is later held unconstitutional, the judgment is final unless timely appeal has been taken. Such a case is:

Chicot, etc. v. Baxter State Bank, 308 U. S. 371,
84 L. Ed. 329, U. S. Supreme Court—1940.

Action to collect on county bonds. Defendant pleaded a judgment of the U. S. District Court under an Act of Congress providing for “municipal debt readjustments”. Plaintiffs had notice of those proceedings which had resulted in a decree barring and discharging the bonds. No appeal had been taken from this judgment. After the judgment had become final, in other proceedings, the U. S. Supreme Court had held the Act of Congress unconstitutional. Plaintiffs therefore claimed the judgment cancelling their bonds, was entirely void and a nullity and brought a new action to enforce the bonds.

The Supreme Court said:

“The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. . . . (Citing authorities.)”

“. . . The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under

which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally.”

The finality of a court’s determination as to jurisdiction cannot be reversed even if the statute under which the Court acted is later held unconstitutional.

The appellants’ attack upon jurisdiction has also been made upon the question of who was served, where and how such service was made. [R. 391, 810.] The trial court’s ruling on such matters will not be reviewed by Appellate Courts. A case so holding, is:

Graham v. Brotherhood of Locomotive Firemen & Enginemen, 94 L. Ed. 22, 338 U. S. 232 (1949).

Negro firemen against their own union, seeking an injunction against racial discrimination. Motion to dismiss by the Brotherhood for:

- (a) Failure to serve process; and
- (b) Action improperly brought in District of Columbia, were both denied by United States Supreme Court.

The District Court had found process was properly served. The Court of Appeals had ordered dismissal because of improper venue in the District of Columbia.

The U. S. Supreme Court in its opinion, said:

“At the outset we are met by the contention in support of the judgment below that service of process upon the Brotherhood was not legally perfected, in which case, of course, it would not properly be before the Court at all. The District Court, after hearing evidence upon the subject, held that service upon the Brotherhood was sufficient. The Court of Appeals

noted that this question was raised but did not reverse upon this ground. Instead, it considered at length whether the action constitutionally could be entertained by the courts of the District of Columbia, a subject which would hardly be ripe for decision if the action had not been properly commenced anywhere. Moreover, its decision transferred the cause to the Northern District of Ohio, a power which it could exert only if it considered the service adequate to confer jurisdiction of the parties. We accept the ruling of the District Court on the adequacy of service, based as it is essentially on matters of fact, and undisturbed and impliedly approved by the Court of Appeals. We hold that personal jurisdiction of the respondent is established." (Emphasis added.)

The contention of failure to serve process, lack of jurisdiction, and similar objections, were first made by appellants in this litigation in 1946. [R. 391.] Their contentions were before the U. S. Supreme Court in 1947, and before this Honorable Court of Appeals in 1947 and 1948, on the prior appeals.

The District Court found by its previous orders and judgments, that it had jurisdiction. It expressly found that it had jurisdiction of the parties and subject matter involved. [R. 2354.]

These findings were not merely "impliedly approved" but by denial of writs and remands to the District Court for trial on the merits, have been expressly approved in 1947 by the U. S. Supreme Court and in 1947, 1948 and 1950, by this Honorable Court of Appeals.

Certainly if the objection of these appellants to the service of process upon them and to the jurisdiction of the District Court had any merit, somewhere in six prior

appeals and writs, such contentions would have been upheld.

To the preliminary injunction involved in this appeal, there are attached as exhibits, five previous orders of the District Court made during 1948 and 1949, each and all of which have become final and conclusive for failure to appeal therefrom. [R. 8310, 8362, 8377, 8399, 8526.] Somewhere within the lifetime of those who commenced this litigation nearly five years ago, there must come an end to the dilatory pleas of lack of jurisdiction. That end should be long past. When the Appeal No. 11751 was dismissed February 6, 1948, appellants had lost in the last court available to them, the contested issues of jurisdiction.

However, yet another appeal was dismissed by them. In November of 1947, the District Court made a number of orders [R. 3137-3139], permitting borrowers whose homes were unmarketable because of clouds on the title created by appellants, to intervene in the action and interplead into the registry of the Court, the amount due on the loans on these borrowers' homes. Such orders contained the following: ". . . the court grants said motion to intervene and accepts jurisdiction of said complaint in intervention. . . ." These orders were four out of a series totalling some fifty similar orders which had been made commencing July 13, 1946, and continuing until November 3, 1947. A schedule of such interventions, the date of the order, the amount deposited in the Registry of the Court and the number of appeals involved will be found at R. 8288 and 8291 which is Footnote 15 of the Preliminary Injunction appealed from in the present appeals. The record references to the full texts of each of such orders is as follows: R. 1604, 1733, 1874, 1591, 1737, 2519, 2539, 1617, 1731, 1376, 1284, 2433, 2034, 2393, 2079, 2377, 3136, 2424, 2443, 1724, 1738, 1561,

1719, 1669, 1723, 2388, 1656, 1648, 1086, 1259, 2382, 1081, 1261, 1462, 1509, 2372, 2055, 2041, 1861, 1643, 1735, 1867, 1854, 2367, 1575, 1721, 1630, 2048, 1714 and 2561. Appellants complied with the requirements of all of these orders and deposited into the Court the notes, deeds of trust and cash required by such orders. As a result thereof, there is approximately \$1,500,000.00 of cash and several hundred such notes and deeds of trust physically in the Registry of the District Court in the custody of the clerk thereof.

Appellants in 1947 and 1948 took their appeals to this Court of Appeals from a series of such intervention and interpleader orders, said appeal being numbered 11867. Among the points on appeal and assignments of error raised by appellants, was lack of jurisdiction of the District Court over the persons and over the subject matter. [See points on appeal, stipulations, etc. R. 3160, 3170.] After losing the writ in the U. S. Supreme Court on jurisdiction and after losing the stay of the order containing the finding "That the court has jurisdiction of the persons and subject matter involved," and after dismissing the appeal to such prior finding on jurisdiction, on February 25, 1948, appellants dismissed their prior appeal from the series of intervention and interpleader orders. [R. 3976.] Thereupon the jurisdiction of the District Court again became final and conclusive over these appellants and over this litigation.

The order restoring the Association, Exhibit A of the Preliminary Injunction presently appealed from [R. 8310],

the Preliminary Injunction against further prosecution of a diversionary action in the Northern District Court, Exhibit D of the Preliminary Injunction [R. 8362], the order requiring deposit of \$14,000,000.00 of notes, deeds of trust, U. S. Government Bonds and other assets into the Registry of the Court, Exhibit F of the Preliminary Injunction [R. 8399], the order for delivery of \$8,500,000.00 of such notes, and deeds of trust from the Registry of the Court to the possession and control of the Long Beach Association, appellees, and vesting title thereto in said Association, Exhibit H of said Preliminary Injunction appealed from [R. 8526], all have become final from lack of appeal therefrom, subsequent to the dismissal by appellants of their two prior appeals, Nos. 11751 and 11867 to the Honorable Court of Appeals.

Appellants have litigated past the point of exhaustion all possible questions of jurisdiction of the District Court over the parties and the subject matter. They have lost these issues in the U. S. Supreme Court, in this Honorable Court of Appeals and in the District Court, not once but on repeated occasions in 1947, 1948, 1949 and 1950.

With 20,000 pages of printed record, 100 court hearings, many final judgments and nearly five years of litigation, the dilatory pleas as to jurisdiction should at last be laid to rest and the litigation proceed to an adjudication on the merits. "It is just as important that there should be a place to end as that there should be a place to begin litigation."

JURISDICTION—BY DOING BUSINESS.

Appellants Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, Ammann and Bramley, all claim immunity from suit. They further claim that the Home Loan Bank Board is an indispensable party and therefore notwithstanding service of summons made upon other appellants within the district, because appellant Home Loan Bank Board does not physically and personally come to California, all are immune. [R. 823, 5073, 6978.] On this theory, appellant Home Loan Bank Board sends its deputies, Ammann, *et al.*, its *alter ego*, appellant Federal Savings and Loan Insurance Corporation and its creature, appellant, San Francisco Bank to perform its confiscations and claims that they all are immune from judicial process in the very district in which they seize and confiscate the real estate and personal property. [R. 823, 5073, 6978.]

The corporate and administrative structure of these interrelated and interlocking agencies and boards is demonstrative of the Congressional intent that all should respond to the courts of the district in which they do business and carry out their statutory functions.

Congress by statute, created the following situations:

A. The Federal Home Loan Banks created by the Federal Home Loan Bank Act (47 Stat. 725, 12 U. S. C. A. 1421-1439), by Section 1432, U. S. C. A. of such Act, Congress provided:

“The directors . . . shall . . . file with the board . . . an organization certificate . . . upon . . . filing of such organization certificate . . . such bank shall become . . . a body corporate, and . . . it shall have power . . . to

sue and be sued, to complain, and to defend in any court of competent jurisdiction, STATE OR FEDERAL, . . . ” (Emphasis added.)

Section 1437, U. S. C. A., creates the Federal Home Loan Bank Board, the predecessors of the Federal Home Loan Bank Administration (the one-man appellant Fahy), who in turn was the predecessor of the present appellants, Home Loan Bank Board.

Section 1437, U. S. C. A., reads in part as follows:

“For the purposes of this Act there shall be a board,”

Throughout the Act this board is given powers of approval, supervision and similar matters.

B. Home Owners Loan Act (12 U. S. C. 1462-1468). In 1933 Congress created the Home Owners Loan Corporation, Section 1462 U. S. C. A. of the Act provided (in subsection (a)):

“(a) The term ‘Board’ means the Federal Home Loan Bank Board created under the Federal Home Loan Bank Act.”

Section 1463(a) U. S. C. A. provided:

“The Board is hereby authorized and directed to create a corporation to be known as the Home Owners’ Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any Court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of

the Board shall constitute the Board of Directors of the Corporation and shall serve as such directors without additional compensation.”

Section 1464(a) U. S. C. A. provided:

“In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, INCORPORATION, examination, operation, and regulation of associations to be known as ‘Federal Savings and Loan Associations,’ and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.” (Emphasis added.)

Although the Act does not specifically so provide, the five-man Home Loan Bank Board in adopting the form of charter for the Federal Savings and Loan Associations, thereby created, provided in Section 3—Objects and Powers—“ . . . the Association . . . shall have perpetual succession and power to . . . sue and be sued, complain and defend in any Court of law or equity.” (Emphasis added.)

All of the hundreds of Federal Savings and Loan Associations throughout the United States, thus by express authority of the Board, are sue or be sued corporations.

Pursuant to Section 1464(d), U. S. C. A. of the Home Owners’ Loan Act, appellant Home Loan Bank Board and its predecessors adopted regulations concerning appoint-

ment of conservators. One of them (Code of Federal Regulations, Title 24, Part 149, Section 149.5(b)) provides:

“The conservator may, under the direction and supervision of the General Counsel of the Home Loan Bank Board, institute, prosecute, maintain, defend, intervene, and otherwise participate in any and all actions, suits or other legal proceedings by and against the conservator or association”

By regulations (Code of Federal Regulations, Title 24, Part 100, Section 101.11) appellants Home Loan Bank Board appoint as their agents for the carrying on of the supervision of the Federal Savings and Loan Associations they have created, the President, Vice-President and other officers of the sue or be sued Federal Home Loan Banks. The supervisory authority of appellants Home Loan Bank Board is thus delegated to their local agents in the various states, territories and districts where such supervision is to be conducted.

In 1934 Congress adopted the National Housing Act (and in late years amended such act) (Stat. Ref., 48 Stat. 1246, 12 U. S. C. A. 1701-1743). By Section 1725(a) of said Act, there was created appellant Federal Savings and Loan Insurance Corporation. Section 402 (a) reads as follows:

“Sec. 1725(a), U. S. C. A. There is hereby created a Federal Savings and Loan Insurance Corporation (hereinafter referred to as the ‘Corporation’), which shall insure the accounts of institutions eligible for insurance as hereinafter provided and shall be under the direction of a board of trustees to be composed of five members and operated by it under such by-laws, rules, and regulations as it may prescribe for carrying

out the purposes of this title. The members of the Federal Home Loan Bank Board shall constitute the board of trustees of the Corporation and shall serve as such without additional compensation. The principal office of the Corporation shall be in the District of Columbia.”

Section 1725(c) U. S. C. A. reads in part as follows:

“Sec. 1725(c), U. S. C. A. Upon the date of enactment of this Act, the Corporation shall become a body corporate, and shall be an instrumentality of the United States and as such shall have power . . .

“(4) To sue and be sued, complain and defend, in any Court of law or equity, State or Federal.”

Section 1726(a) reads as follows:

“Sec. 1726(a), U. S. C. A. It shall be the duty of the corporation to insure the accounts of all Federal Savings and loan associations and it may insure the accounts of building and loan, savings and loan, and homestead associations and cooperative banks organized and operated according to the laws of the State, District, or Territory in which they are chartered or organized.” (Emphasis added.)

There is thus created an insurance corporation required by Statute to insure accounts and transact business THROUGHOUT all of the states, territories, or districts of the United States wherein there are located any Federal Savings and Loan Associations or other insured savings institutions.

The result of this mass of legislation by Congress and by appellant Home Loan Bank Board and its predecessors can be summarized as follows:

There are created:

1. Twelve Federal Home Loan Banks under the supervision and direction of appellants Home Loan Bank Board each of which are sue or be sued corporations.

2. There is created the Home Owners Loan Corporation, transacting business consisting of relieving distressed homeowners by refinancing their mortgages throughout all of the states, territories and districts of the United States. Home Owners Loan Corporation is a sue or be sued corporation.

3. There is created Federal Savings and Loan Insurance Corporation whose duty it is to insure the safety of the savings of all of the citizens of the states, territories and districts of the United States, wherein are created federal savings and loan associations or other insured institutions. Federal Savings and Loan Insurance Corporation is a sue or be sued corporation.

4. There are created hundreds of federal savings and loan associations under the direct supervision and control of appellants Home Loan Bank Board, which supervision is to be exercised at the offices of such federal associations throughout all of the states, territories and districts of the United States. All Federal Savings and Loan Associations are sue or be sued corporations.

5. There is created a system of conservators or receivers either or both of which are sue or be sued, appointed by appellants Home Loan Bank Board and can only exercise their delegated authority by seizing possession of real or personal property in the various states, territories and districts of the United States.

Appellants Home Loan Bank Board are (1) the approving and supervising board over the 12 Federal Home Loan Banks; (2) the sole directors of the Home Owners' Loan Corporation and its only governing authority; (3) the sole trustees of the Federal Savings and Loan Insurance Corporation and its only governing authority; (4) the incorporators and creators of the hundreds of Federal Savings and Loan Associations which are under their direct supervision and control; (5) appellants Home Loan Bank Board appoint conservators and receivers for many of this mass of "sue or be sued" corporations, yet appellants Home Loan Bank Board claim that they alone of this entire organization are immune from process and exempt from suit.

The entire statutory scheme of the Federal Home Loan Bank Act, Home Owners Loan Act, National Housing Act, and related Acts of Congress, was to create government agencies and corporations for the particularly local business of home financing, of necessity affecting ownership, title and possession of real property, mortgages, trust deeds and other encumbrances on real property. This was

recognized in Re-Organization Plan No. 3, 12 F. R. 4981, when:

(a) The Home Loan Bank Board was created by combining the functions of:

- (1) The sue or be sued H. O. L. C.
- (2) The sue or be sued F. S. & L. Ins. Co.;
- (3) The supervision of the sue or be sued F. H. L. B.'s;
- (4) The supervision of the sue or be sued Federal savings and loan associations;
- (5) The appointment or removal of the sue or be sued conservator and sue or be sued receivers.

The sue or be sued Federal Housing Administration was likewise consolidated into the same overall agency, but as a separate branch thereof.

Appellants contend that the intent of Congress was, out of this mass of sue or be sued corporations, agencies, appointees, subsidiaries and delegates, that they alone should be immune from suit and beyond the reach of all courts.

It is obvious that Appellants Home Loan Bank Board, through its manifold agents in their various capacities, have at all times been and now are doing business throughout the 48 States, and particularly as concerns this litigation, in the State of California and in the District of the Court below.

Under these circumstances, the following statutes and cases illustrate that the sue or be sued agencies and corporations, so doing business can be called into the courts of the district or territory where such business

is done with particular reference to causes of action arising out of such business so done in such district.

New Title 28, U. S. C., Section 1391, subdivision (c) reads in part as follows:

“A corporation may be sued in any judicial district in which it . . . is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.”

F. R. C. P. Rule No. 4, Process, Subdivision (d) Summons: Personal Service.

“The summons and complaint shall be served together . . . Service shall be made as follows:

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“(3) Upon a domestic or foreign corporation . . . by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . .

“(5) Upon an officer or agency of the United States, . . . If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

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“(e) Same: Other Service. Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

“(f) Territorial Limits of Effective Service. All process other than a subpoena may be served any-

where within the territorial limits of the state in which the district court is held, and when a Statute of the United States so provides, beyond the territorial limits of that State. . . .” (Emphasis added.)

Full compliance with these statutes and rules was had throughout these proceedings. [R. 65-84; 786-787; 795-804, 2536-2554; 2556-2557; 5298-5302, 5357, 5393; 5468.] Appellants Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, Divers, Adams, LaRoque, Ammann, Bramley, San Francisco Bank, *et al.*, are by the express requirements of the statutes (including, Home Owners’ Loan Act, National Housing Act, Federal Home Loan Bank Act, etc., and the various regulations and their amendments thereto), doing business within the State of California.

Such “doing business” consists of the supervision, regulation, creation, dissolution, liquidation, re-organization, consolidation, and similar acts of business of the Federal Home Loan Banks, Federal Savings and Loan Associations, and the promotion of thrift and home-building. Such business, of necessity, deals with and immediately and vitally affects ownership, possession and title to thousands of parcels of real property in the State of California, the homes of the borrowers from the federal savings and loan associations and the state savings and loan associations, who are members of the Federal Home Loan Banks. The re-discount, in multi-million dollar amounts of such home mortgages to the home financing agencies is the

business for which appellants were created by Acts of Congress.

The insurance of the safety of the accounts of the 16,000 depositors of appellee Long Beach Association, and of the hundreds of thousands of depositors in the other insured institutions throughout California, is the doing business within the State of California ordered by Congress in the above statutes, to be performed by appellants Divers, Adams, and LaRoque, as sole trustees of the “sue or be sued” appellant Federal Savings and Loan Insurance Corporation, as supervisors and regulators of the “sue or be sued” Federal Home Loan Banks and Federal Savings and Loan Associations.

In order to “do business” in California as required by statutes of Congress, appellants maintain their staff of examiners of insured Savings and Loan Associations. They have their managing agent at Los Angeles and at San Francisco. (Code of Fed. Reg., Title 24, Part 100, Section 101.11.) The officers, President, Secretary, Vice-President, etc., of appellant San Francisco Bank, or of whatever Federal Home Loan Bank exists, are the agents and representatives transacting the business of appellants Home Loan Bank Board in its various capacities, as trustees of appellant Federal Savings and Loan Insurance Corporation, as members of the Home Loan Bank Board; as directors of the Home Owners’ Loan Corporation; and in the various other “sue or be sued” corporate agencies of other functions of such appellants. (Code of Fed. Reg., Title 24, Part 100, Section 101.11.)

The following cases will demonstrate the fallacy of the contentions of appellants that they are immune from suit in such business undertakings, or that they can be sued, if at all, only at Washington, D. C., 3,000 miles dis-

tant. These claims have been put forth by other Government agencies and corporations, as well as by private corporations. A leading case is:

Seven Oaks v. F. H. A., 171 F. 2d 947 (C. C. A. 4th, 1948).

Action for damages and to establish trust in real estate, etc., in United States District Court in Virginia against F. H. A. which moved to dismiss on the ground that it could not be sued outside of the District of Columbia. Lower Court dismissed and was reversed by C. C. A. 4th, which said:

“ . . . The complaint alleges three causes of action, the first two of which ask damages on account of alleged negligence and wrongful conduct and the third seeks to have a trust in favor of plaintiff declared with respect to certain real estate in the district owned by the Housing Administration. . . .

(1) We think that the venue was proper and that there was error in dismissing the suit. The Eastern District of Virginia was the district in which the cause of action arose, the Housing Administration was carrying on business in that district and one of the purposes of the suit was to have a trust declared on real estate there situate. We think that the statute permitting suit against the Housing Administration authorized suit within the district; that irrespective of this, the suit was properly brought within the district because of the venue statute relating to corporations; and that, in any view of the case, it was properly brought as to the third cause of action alleged which was a local action relating to real estate within the district.

The statute giving consent to suit is more than a mere waiver of immunity. It provides not only that the agency may be sued but also in what courts suit may be instituted. The exact language of the statute is: "The Administrator shall * * * be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." 49 Stat. 722, 12 U. S. C. A. §1702. . . . but where the Housing Administration is doing business within a district and has present an agent in charge of its affairs, there is no reason why service of process cannot be made upon it and upon the United States, whose representative it is, in accordance with the provisions of Rule 4(d)(4) and (5), Federal Rules of Civil Procedure, . . .

"(2) If, however, the statute authorizing suit against the Housing Administration be regarded as a mere waiver of immunity, we think that suit within the district was authorized on the ground that the Administration is to be regarded as a public corporation within the meaning of the venue statutes and was suable within the district because engaged in business there. While the Housing Administration may not be a corporation in the strict sense of the word, it is given many powers of corporations; and it is worth noting that the power to sue and be sued was conferred upon it by a provision of the statute creating a federal corporation, the Federal Deposit Insurance Corporation, 49 Stat. 722. It is listed by the Supreme Court itself among the federal corporations created by recent acts of Congress (Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 390, 59 S. Ct. 516, 83 L. Ed. 784); and that court has held that suit may be brought against it in its agency name just as though it were a corpo-

ration. Federal Housing Administration, Region No. 4, v. Burr, 309 U. S. 242, 60 S. Ct. 488, 84 L. Ed. 724. We see no reason why such an agency should not be treated, for purposes of suits against it, as a federal corporation within the meaning of the venue statute which provides that 'a corporation may be sued in any judicial district in which it * * * is doing business.' 28 U. S. C. A. §1391(c).

(3, 4) The contention that it was the intention of Congress that the venue of suits against the Housing Administration be limited to the District of Columbia, the official residence of the Administrator, or that the Administration should have the discretion to say when it might be sued elsewhere by waiving venue, will not bear analysis. Congress certainly knew, when providing for suit in state courts, that there were no such courts in the District of Columbia; and when it provided that a great business agency authorized to engage in business throughout the country might sue and be sued like an ordinary business corporation, it could hardly have intended that persons in California, Hawaii or Alaska, desiring to exercise the right to sue must travel to the District of Columbia to do so. Cf. *Ferguson v. Union National Bank of Clarksburg*, 4 Cir. 126 F. 2d 753, 757.

. . .

"It must be conceded by everyone that it is highly desirable that a federal agency such as the Housing Administration be suable in the district where it is doing business on causes of action arising out of the business done there." . . .

"(5) Irrespective of other considerations, the fact that the suit sought to impress a trust on real estate

within the district was sufficient to satisfy the venue requirements as to that cause of action. See 28 U. S. C. A. §§1392(b), 1655 (old section 118) (citing authorities.) Consent that the Housing Administration be sued had been expressly given. 49 Stat. 722. Federal Housing Administration, Region No. 4 v. Burr, 309 U. S. 242, 60 S. Ct. 488, 84 L. Ed. 724. And the agency had been duly served with process by service upon the state director and upon the United States Attorney and the Attorney General of the United States. Federal Rules Civil Procedure 4(d)(4) and (5).” . . .

“ . . . We have not considered and make no intimation as to the right of plaintiff to maintain suit on the causes of action alleged, nor as to the validity of the defenses asserted against them. We prefer to consider questions with regard to these matters in the light of the facts as they may be developed in the further hearing of the case.” . . . (Emphasis added.)

In our present appeals the statute submitting appellant F. S. & L. Ins. Corp. to suit is even broader than that quoted in *Seven Oaks v. F. H. A.*, Section 402(c) (12 U. S. C. A., 1725(c)), National Housing Act, insurance of savings and loan accounts, reads: “Upon the date of enactment of this act the corporation shall become a party corporate and shall be an instrumentality of the United States and shall have power to sue and be sued, complain and defend in any court of law and equity, State or Federal.” . . .

The language “State or Federal” commented upon by the Fourth Circuit as requiring the agency or corporation to submit to suit outside the District of Columbia because

there are no State courts within the District, has equal force and application to our present appeals.

The additional language "Congress . . . could hardly have intended that persons in CALIFORNIA . . . desiring to exercise the right to sue must travel to the District of Columbia to do so" should be decisive of all questions of indispensable parties raised by appellants in these present appeals.

One of the latest U. S. Supreme Court decisions on "doing business" is:

Travelers Health Assoc. v. Virginia, 339 U. S. 643, 94 L. Ed. 1154 (U. S. Supreme Court—June 5, 1950).

Appellant, a Nebraska NON-profit membership CORPORATION, conducted health insurance business in Virginia by mail. It had no agent in Virginia. Its membership within the State of Virginia was about 800. Virginia laws required a permit from the Corporation Commission for such activities, and provided after notice and hearing on the merits, that the Corporation Commissioner could issue a cease and desist order, restraining violation of the Act. Service of process by registered mail was authorized.

Proceedings were instituted against Travelers Health and its treasurer, individually and as treasurer. Having received notice only by registered mail, they appeared specially for the sole purpose of objecting to the jurisdiction of Virginia and its State Corporation Commission, and moved to set aside and quash service of summons.

Commission overruled their objections and issued a cease and desist order. Order was affirmed by Virginia

Courts and attacked in U. S. Supreme Court on the ground of denial of due process.

Virginia Law required non-residents who sought a permit to do business in the state, to name the Secretary of State an agent for service of process. No such nomination had ever been made.

The U. S. Supreme Court upheld Virginia's authority to issue the order (in effect an injunction), and said:

" . . . basic contention is that all their activities take place in Nebraska, and that consequently Virginia has no power to reach them in cease and desist proceedings to enforce any part of its regulatory law. We cannot agree with this general due process objection, for we think the state has power to issue a 'cease and desist order' enforcing at least that regulatory provision requiring the Association to accept service of process by Virginia claimants on the Secretary of the Commonwealth."

" . . . And in *International Shoe Co. v. Washington*, 326 U. S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 161 A. L. R. 1057, this Court, after reviewing past cases, concluded: 'due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' ' "

* * * * *

"Moreover, if Virginia is without power to require this Association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificate holders might be Nebraska. Health benefit claims are seldom so large

that Virginia policyholders could afford the expense and trouble of a Nebraska law suit. In addition suits on alleged losses can be more conveniently tried in Virginia where witnesses would most likely live and where claims for losses would presumably be investigated . . . And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated. The Due Process Clause does not forbid a state to protect its citizens from such injustice.

“There is, of course, one method by which claimants could recover from appellants in Virginia courts without the aid of substituted service of process: certificate holders in Virginia could all be garnished to the extent of their obligations to the Association. (Citing authorities.) . . . While such an indirect procedure would undeniably be more troublesome to claimants than the plan adopted . . . it would clearly be even more harassing to the Association and its Virginia members . . .”

“We hold that Virginia’s subjection of this Association to the jurisdiction of that state’s Corporation Commission in a §6 proceeding is consistent with ‘fair play and substantial justice,’ and is not offensive to the Due Process Clause. . . .”

“It is also suggested that service of process on appellants by registered mail does not meet due process requirements. What we have said answers this contention insofar as it alleges a lack of state jurisdiction because appellants were served outside Virginia. If service by mail is challenged as not providing adequate and reasonable notice, the contention has been answered by *International Shoe Co. v.*

Washington, *supra* (326 U. S. 320, 321, 90 L. Ed. 104, 105, 66 S. Ct. 154, 161 A. L. R. 1057). See also *Mullane v. Central Hanover Bank & T. Co.*, 339 U. S. 306, *ante*, 865, 70 S. Ct. 652.”

A recent leading case on “doing business” is:

Int. Shoe Co. v. Washington, 326 U. S. 310, 90 L. Ed. 95 (U. S. Supreme Court—1945).

State of Washington assessed appellant for employees’ unemployment contributions. Appellants objected that it was denied due process because it was not doing business in Washington, had not appointed Washington agent for service of process, nor otherwise submitted to the jurisdiction.

The Court said:

“In this case notice of assessment for the years in question was personally served upon a sales solicitor employed by appellant in the State of Washington, and a copy of the notice was mailed by registered mail to appellant at its address in St. Louis, Missouri. Appellant appeared specially before the office of unemployment and moved to set aside the order and notice of assessment on the ground that the service upon appellant’s salesman was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made;
• • •

“• • • Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, . . .”

“Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in

that state and makes there no deliveries of goods in intrastate commerce. . . .”

“. . . No salesman has authority to enter into contracts or to make collections.”

* * * * *

“. . . due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’ (citing authorities)”

“‘Presence’ in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on even though no consent to be sued or authorization to an agent to accept service of process has been given. (Citing authorities.)”

“But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations and so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. (Citing authorities.)”

“Applying these standards the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. . . . The obligation which is here sued upon arose out of those very activities. It is evident

that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

“We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant’s ‘presence’ there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual. . . . (citing authorities.) Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit. . . . (citing authorities.)”

Service of process upon a corporation where it contracts the liability sued on, is a remedial enactment to be liberally construed, was the holding of:

United States v. Scophony Corp., 333 U. S. 795;
92 L. Ed. 1091 (U. S. Supreme Court, 1948).

Anti-trust suit against British corporation, served in U. S. District Court in New York. The statute, Clayton Anti Trust Act, provided for venue over the corporation wherever it may be found or transacts business. Compare with New Title 28, Section 1391(c) which reads: “A corporation may be sued in any judicial district in

which it is . . . doing business,” and with F. R. C. P. Rule 4(d), which reads: “Service shall be made . . . upon a domestic or foreign corporation . . .” is “by delivering the copy of the summons and complaint to an officer, a managing or general agent. . . .”

The question in the *Scophony* case was definitions of “found” and “transacting business.” The similarity between “transacting business” and “doing business” makes the decision applicable to this appeal.

The Supreme Court said:

“This construction gave the words ‘transacts business’ a much broader meaning for establishing venue than the concept of ‘carrying on business’ denoted by ‘found’ under the pre-existing statute and decisions. The scope of the addition was indicated by the statement ‘that a corporation is engaged in transacting business in a district . . . if in fact, in the ordinary and usual sense, it ‘transacts business’ therein of any substantial character.’ *Id.* 273 U. S. at 373, 71 L. ed. 689, 47 S. Ct. 400. (Emphasis added.)”

“Thus, by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the ‘found’-‘present’-‘carrying-on-business’ sequence, the Court yielded to and made effective Congress’ remedial purpose. Thereby it relieved persons injured through corporate violations of the antitrust laws from the ‘often insuperable obstacle’ of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due.”

One of the first cases in which the Supreme Court recognized the modern trend that corporations are amenable to suit wherever they do business was:

Eastman Kodak v. Southern Photo, 273 U. S. 359;
71 L. Ed. 684 (U. S. Supreme Court—1927).

The Supreme Court said at page 689:

“That Congress may, in the exercise of its legislative discretion, fix the venue of a civil action in a federal court in one district, and authorize the process to be issued to another district in which the defendant resides or is found, is not open to question. *United States v. Union P. R. Co.*, 98 U. S. 569, 604, 25 L. Ed. 143, 151; *Robertson v. Railroad Labor Bd.*, 268 U. S. 619, 622, 69 L. Ed. 1119, 1121, 45 Sup. Ct. Rep. 621.”

In our present appeals, all appellants are “doing business” or “transacting business” within the territory of the district of the Court below and within the State of California. Of necessity, such business is local. It consists of the financing of homes, by mortgages, trust deeds, and other encumbrances upon real property.

Causes of action arising from such business, involving the title to such deeds of trust and real property, must be enforceable in the district where the real property is physically situated, or they cannot be enforced anywhere. A judgment of a Washington D. C. Court, which might bind appellants Home Loan Bank Board, would be worthless against appellants Ammann, San Francisco Bank, Los Angeles Bank and other claimants.

Only a Court having *in rem* jurisdiction over the real property involved, can adjudicate in one action, as between all the parties. Jurisdiction is either in the Court below in California, or for all practical purposes, there is no jurisdiction in any Court.

THE COURT HAD JURISDICTION TO HEAR THE
CASE ON THE MERITS TO DECIDE ITS JURIS-
DICTION.

If, as alleged, appellants acted unconstitutionally, beyond their statutory or other authority, arbitrarily, capriciously and maliciously, such actions are not protected by a claim of immunity as officers of the United States. If the allegations of the complaints, cross-claims and other pleadings, are true, the Court had jurisdiction over all appellants. If the allegations of the pleadings are not sustained, jurisdiction over some appellants may be lacking. But this question can only be decided by a decision of the merits in:

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209, U. S. Supreme Court—1947.

The Supreme Court said:

“This is the type of case where the question of jurisdiction is dependent upon the decision of the merits.” (Citing authorities.)

The Court below stated in its conclusion No. 4 [R. 8297] as follows:

“That some of the issues in the main litigation involved, will require a determination of the case on its merits, before a final determination can be made as to the jurisdiction of this Court with relation to certain situations and phases of the litigation, which raise the question of jurisdiction.”

This whole subject is treated at greater length and the cases briefed in the section of this brief “Appellants are not Immune from Suit,” to which reference is made for complete treatment.

III.

APPELLANTS ARE NOT IMMUNE FROM SUIT.

Appellants maintain that the appellant conservator, Ammann, appellants Fahey, Divers, Adams, LaRoque, members or former members of the Home Loan Bank Board, the appellant Federal Savings and Loan Insurance Corporation, and appellant Federal Home Loan Bank of San Francisco, are each and all immune from suit, on each and all of the causes of action stated by the numerous complaints, cross-claims, amended and supplemental.

They base their claim of immunity upon the ground that the sovereign is immune to suit. Appellants' claim of immunity is made in blanket form.

To properly refute this claim, it is necessary that the situation of the several appellants be considered individually.

The Federal Home Loan Bank of San Francisco and Federal Savings and Loan Insurance Corporation are both "sue or be sued" corporations, incorporated as such under Acts of Congress. By the express terms of such acts, the sovereign's immunity from suit is waived. (47 Stat. 725; 12 U. S. C. A. 1421-1439; 48 Stat. 1246; 12 U. S. C. A. 1701-1743.)

By the express terms of the charter (organization certificate) of the Federal Home Loan Banks of Portland [R. 7236], San Francisco or Los Angeles [R. 7231], whichever of the three exists, immunity from suit is expressly waived.

By the express terms of the regulations under which the conservator claimed to act, immunity to suit is likewise expressly waived. Code of Federal Regulations, Title 24, Chapter 1(C). The present regulation No. 149.5 "Powers and Duties of Conservator", subsection (f) reads as follows:

"The Conservator . . .

"(f) May, under the direction and supervision of the General Counsel of the Home Loan Bank Board, institute, prosecute, maintain, defend, intervene, and otherwise participate in any and all actions, suits or other legal proceedings by and against the conservator or association or in which the conservator, the association, or its creditors or members, or any of them, shall have an interest, and in every way to represent such association, its members and creditors;"

Immunity from suit is not a doctrine favored by either Congress or the courts. Recent sessions of the United States Supreme Court have refused immunity to agencies and corporations engaged in the general business world.

Congress by express statute, has waived immunity from suit of appellants and appellee Federal Home Loan Banks and appellant Federal Savings and Loan Insurance Corporation. Appellants Home Loan Bank Board have themselves waived the immunity from suit of appellant conservators Ammann and Bramley. All of the appellants, except Home Loan Bank Board, are the agents and personal appointees of Home Loan Bank Board. They exercise their authority only under appellant Home Loan Bank

Board's direct supervision and express approval. Appellant Home Loan Bank Board thus directs and controls its agents and appointees in defending and maintaining this litigation. Yet appellant Home Loan Bank Board and its members attempt to claim that they themselves, who are the "master minds" of this litigation, are completely immune from, and beyond the power of, the very courts into which they send their agents and deputies to defend the confiscations, the subject of this litigation.

Even had such immunity existed, it was of course waived and abandoned by the general appearance of appellants Home Loan Bank Board and its members, made before the District Court by the filing of Resolution No. 388, which by its terms required that a certified copy thereof be filed with the court "forthwith." [R. 3404.]

The attitude of Congress towards agencies' immunity from suit is aptly expressed by subdivision (c) of Section 10 of the Administrative Procedure Act (1009 U. S. C. A.), which reads:

"Reviewable Acts. Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

The English language could not be plainer. If there is no other adequate remedy for judicial review, the Administrative Procedure Act creates one.

The claim of immunity from suit by government officials and government corporations, has been rejected by a

series of Supreme Court decisions, one of the latest of which is:

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209 (1947),

in which the United States Supreme Court in 1947, at the same term in which it decided Fahey's first appeal and remanded this present case to the U. S. District Court at Los Angeles for a trial on the merits, flatly rejected the doctrine of immunity from suit by wrongdoing government officials.

The U. S. Supreme Court said:

" . . . this is the type of case where the question of jurisdiction is dependent on decision of the merits.

"The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents' property under the claim that it belongs to the United States. . . ."

" . . . But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld. . . .

"We intimate no opinion on the merits of the controversy. We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." (Emphasis added.)

IMMUNITY FROM SUIT.

The ultimate result of the *Land v. Dollar* litigation was the recovery by the Dollar Steamship Company of a judgment for return of its stock alleged by the members of the Maritime Commission to have become the property of the United States. Immunity from suit has also been decided adversely to government officials making such claim in:

Keifer v. R. F. C., 306 U. S. 381, 83 L. Ed. 784,
U. S. Supreme Court—1939.

Plaintiffs sued two government corporations for damages for negligence in the care of livestock. Congress had in the Act creating R. F. C., made it a sue or be sued corporation. The other defendant, Regional Agricultural Credit had been organized by R. F. C. pursuant to Act of Congress, which Act did not contain any sue or be sued waiver of sovereign immunity. District Court in Nebraska and C. C. A. 8, both held the government corporations immune from suit for damages and dismissed plaintiffs' complaint.

Both R. F. C. and Regional were completely government owned corporations. All stock of both being by U. S. U. S. Supreme Court in an unanimous opinion reversed, and ruled both government corporations liable for damages exactly as any other litigant. In doing so, the U. S. Supreme Court announced that the modern trend was away from immunity to suit unless expressly conferred by direct enactment of Congress.

The Supreme Court said:

"Therefore, the government does not become the conduit of its immunity in suits against its agents

or instrumentalities merely because they do its work. (Citing Authorities.) But this would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted. In the context of modern thought and practice regarding the use of corporate facilities, such a clause is not a ritualistic formula which alone can engender liability. . . .”

“Congress may, of course, endow a governmental corporation with the government’s immunity. But always the question is: has it done so? (Citing authorities.) This is our present problem. Has Congress endowed Regional with immunity in the circumstances which enveloped its creation? . . .”

“. . . In spawning these corporations during the past two decades, Congress has uniformly included amendability to law. Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to-sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope. It is noteworthy that the oldest surviving government corporation—the Smithsonian Institution—has several times been in the law courts, even in the absence of explicit authority and although the general feeling regarding governmental immunity was very different in 1846 from what it has become in our own day. (Citing authorities.)”

“To give regional an immunity denied to more than two score corporations, each designed for a purpose of government not relevantly different from that which occasioned the creation of

Regional, is to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none. . . .”

“Congress has embarked upon a generous policy of consent for suits against the government sounding in tort even where there is no element of contract. . . .”

“. . . Congress has thus clearly manifested an attitude which serves as a guide to the scope of liability implicit in the general authority it has conferred on governmental corporations to sue and be sued. We should be denying the recent trend of Congressional policy to relieve Regional from liability. This compels us to reverse the judgment of the court below.

“Reversed.”

It is interesting to observe that in *Keifer v. R. F. C.*, an executive order had transferred control of one of the government corporations to the Farm Credit Administration prior to the infliction of damages. The same R. F. C. HELD LIABLE TO SUIT FOR DAMAGES IN THE KEIFER CASE, WAS AT THE TIME OF THE SEIZURES OF THE APPELLEES LOS ANGELES BANK AND LONG BEACH ASSOCIATION, OWNER OF ALL OF THE GOVERNMENT OWNED STOCK IN THE PORTLAND LOS ANGELES BANKS, AGGREGATING \$9,967,900.00 IN THE LOS ANGELES BANK AND \$5,960,000.00 IN THE PORTLAND BANK A COMBINED TOTAL OF APPROXIMATELY FIFTEEN MILLION DOLLARS. R. F. C. CONTINUED TO BE THE OWNER OF SUCH STOCK IN THE APPELLANT SAN FRANCISCO BANK UNTIL AFTER THE REMOVAL OF THE CONSERVATOR BY ORDER OF THE COURT BELOW.

Sue or be sued includes garnishment and every other judicial process. It is not limited to actions in which the Government agency or corporation is merely a party. Willingness to waste thousands of dollars in useless litigation is not confined to the Government officials in our present *Mallonee v. Fahey* appeal. For a \$71.11 garnishment, the F. H. A. took a case through the U. S. Supreme Court. Such a case was:

F. H. A. v. Burr, 309 U. S. 242, 84 L. Ed. 724 (1940).

Plaintiffs had obtained a judgment against an employee of F. H. A. and garnished his salary by service of process on F. H. A. The total amount was \$71.11.

The F. H. A. appealed to the U. S. Supreme Court.

In holding the F. H. A. subject to judicial process the same as any other litigant, the Supreme Court said (p. 728):

“ . . . For there can be no doubt that Congress has full power to endow the Federal Housing Administration with the Government’s immunity from suit or to determine the extent to which it may be subjected to the judicial process. (Citing authorities.)”

“As indicated in *Keifer & Keifer v. Reconstruction Finance Corp. supra*, we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the cur-

rent disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned. *Keifer & Keifer v. Reconstruction Finance Corp. supra.* Hence, when congress established such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. . . .” (Emphasis added.)

“. . . In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be. . . .”

“In our view, however, the bridge was crossed when Congress abrogated the immunity by this 'sue and be sued' clause. And no such grave interference with the Federal function has been shown to lead us to imply that Congress did not intend the full consequences of what it said. Hence, considerations of convenience, cost and efficiency which have been urged here are for Congress which, as we have said, has full authority to make such restrictions on the 'sue and be sued' clause as seem to it appropriate or necessary.”

Government agencies have been made original litigants when Congress renders them subject to suit. Traditional

government immunity from costs and expenses of litigation was denied to R. F. C. in the case of:

R. F. C. v. Menihan, 312 U. S. 81, 85 L. Ed. 595 (1941).

R. F. C. took assignments of mortgages, as well as directed transfers of real and personal property as security for a loan. In connection with sales of the property under foreclosure, an injunction decree was decided against the R. F. C. The successful party sought judgment for costs, which the R. F. C. resisted because it was an instrumentality of the Government.

The Supreme Court in holding that the R. F. C. was subject to the same liability as any private litigant who happened to lose a lawsuit, said in its opinion at page 83:

“The Reconstruction Finance Corporation is a corporate agency of the government, which is its sole stockholder. (January 22, 1932) 47 Stat. at L. 5, chap. 8, 15 U. S. C. A. § 601. It is managed by a board of directors appointed by the President by and with the advice and consent of the Senate. The Corporation has wide powers and conducts financial operations on a vast scale. While it acts as a governmental agency in performing its functions (see *Pittman v. Home Owners' Loan Corporation*, 308 U. S. 21, 32, 33, 84 L. ed. 11, 16, 17, 60 S. Ct. 15, 124 A. L. R. 1263), still its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign. (Citing authorities.)”

“ . . . In the Keifer Case we did not find it necessary to trace to its origin the doctrine of the exceptional freedom of the United States from legal responsibility, but we observed that ‘because the doctrine

gives the government a privileged position, it has been appropriately confined.’ Hence, we declared that ‘the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.’ *Id.* 306 U. S. p. 388, 83 L. ed. 788, 59 S. Ct. 516. Recognizing that Congress may endow a governmental corporation with the government’s immunity, we found the question to be ‘Has it done so?’ That is, immunity in the case of a governmental agency is not presumed. We sought evidence that Congress had intended that its creature, considering the purpose and scope of its powers, should have the immunity which the sovereign itself enjoyed, and we noted the practice of congress as an indication ‘of the present climate of opinion’ which had brought governmental immunity from suit into disfavor. Accordingly, being unable to find that Congress had intended immunity from suit we denied it.”

“ . . . Starting from the premise indicated in the Keifer Case that waivers by congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities—that being in line with the current disfavor of the doctrine of governmental immunity—we concluded that in the absence of a contrary showing ‘it must be presumed that when congress launched a governmental agency into the commercial world and endowed it with authority to “sue and be sued” that agency is not less amenable to judicial process than a private enterprise under like circumstances

would be.’ Following that reasoning, the precise point of the decision was that the words ‘sue and be sued’ normally embrace all civil process incident to the commencement or continuance of legal proceedings and hence embraced garnishment as part of that process.”

“ . . . We apply the principle that there is no presumption that the agent is clothed with sovereign immunity.”

“ . . . The additional allowance made by courts of equity in accordance with sound equity practice is likewise such an incident. *Sprague v. Ticonic Nat. Bank*, 307 U. S. 161, 83 L. ed. 1184, 59 S. Ct. 777. . . .”

“ . . . We think that the unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances” (Emphasis added.)

Sprague v. Ticonic National Bank, cited by the Supreme Court in *R. F. C. v. Menihan*, dealt with the allowances of attorneys’ fees in favor of one litigant and against others. The above quoted language of the *Menihan* case is decisive of the Special Master’s fee and attorneys’ fee appeals presently pending before this Honorable Court of Appeals. This however, is a subject for further treatment in appellees’ briefs on those appeals.

There is great similarity between Federal Home Loan Banks which are appellants and appellees on these appeals

and Federal Land Banks created by prior Acts of Congress. A case holding such Land Banks subject to attachment in state court proceedings, exactly as any other litigant, is:

Federal Land Bank of St. Louis v. Priddy, Circuit Judge, 295 U. S. 229, 79 L. Ed. 1408 (1935).

Petitioner, Federal Land Bank, sought prohibition against Arkansas State Judge, because he permitted a suit and attachment against the Land Bank.

The Supreme Court of Arkansas denied prohibition and U. S. Supreme Court, on certiorari, affirmed this denial.

The action was by a real estate broker to recover a commission. The broker attached real property of the Land Bank as that of a foreign corporation. The Land Bank made special appearances and moved to vacate the attachment on the ground that it was immune from attachment.

When the trial court denied the motion, prohibition was sought. U. S. Supreme Court refused to review the holding that the Land Bank was a foreign corporation, but did decide that the Land Bank was subject to attachment.

Supreme Court said:

“Without now entering into a detailed examination of the subject, it is sufficient that this Court has already had occasion to consider the organization and functions of federal land banks, and to declare that they are instrumentalities of the federal government, engaged in the performance of an important governmental function. (Citing cases.) As such, so far as

they partake of the sovereign character of the United States, Congress has full power to determine the extent to which they may be subjected to suit and judicial process. (Citing authorities.) . . .”

“. . . federal land banks . . . were intended to be subject to the incidents of suit, including attachment and execution. In creating federal land banks as government instrumentalities, but with many of the purposes and activities of private corporations, in exempting them alone from taxation, and at the same time subjecting them, like joint stock land banks, to suit . . . Congress cannot be thought to have intended that either class of banks should be immune from attachment. . . .”

Appellants claim they are the agents or instrumentalities of the Home Loan Bank Board, or of the Government itself, and because the United States is not subject to suit, its agencies or instrumentalities are also immune. A case directly contrary to such claim is:

Brady v. Roosevelt Steamship Company, 317 U. S. 575, 87 L. Ed. 471 (1942).

Action in tort for wrongful death caused by negligence. Defendant was a private steamship company operating a vessel owned by the U. S. Maritime Commission. The private steamship company claimed immunity from suit because the contract under which it was operating the ship made the United States directly liable for all obligations of the operator of the ship.

In denying immunity to suit to the private corporation, the United States Supreme Court said:

“For when it comes to the utilization of corporate facilities in the broadening phases of federal activities in the commercial or business field, immunity from suit is not favored. (Citing authorities.) . . .

“Moreover, if petitioner had a cause of action against respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained. (Citing authorities.) The rights of principal and agent inter se are not the measure of the rights of third persons against either of them for their torts. . . .”

SUMMARY OF IMMUNITY TO SUIT.

Appellants contend that because they are Governmental agencies their every action is beyond review by any court; that they are immune from suit; that damage claims cannot be maintained against them; in short, that they can do no wrong and are beyond all authority.

The foregoing cases demonstrate that sue or be sued corporations or agencies are exactly like any other litigant. They are liable in tort actions for damages, for costs, for “allowances”, including attorneys’ fees. They are subject to attachment or garnishment and the fact that all of their stock is owned by the Government which eventually pays such judgments, in no way affects the litigation against such Government Corporations and agencies.

IV.

APPELLANTS' ORDERS ARE ALL
REVIEWABLE.

Appellants contend primarily that they are beyond the jurisdiction of any Court, regardless of the source of the Court's authority and regardless of where the Court may be situated, either in California where the real property and all other assets are located, or in Washington, D.C., where certain of appellants maintain their official offices.

Secondarily, appellants contend that if they are subject to the jurisdiction of some Court, they are not subject to the jurisdiction of the Court below. Yet, they told the First Congressional Committee in 1946, when this litigation was less than two weeks filed, that:

"Mr. Fahey . . .

Suit has been entered in the Federal Court in an effort to regain control of this institution. Gregory has set up the false and hypocritical cry that I acted in this matter in reprisal against him because of his effort to force the election of Berry as president of the Federal Home Loan Bank, the Los Angeles Bank. It is assumed that the courts will presently determine the justification for our action." [R. 185.]

"Mr. Fahey: Mr. Chairman, there is much that we would be glad to submit, but this hearing has already dragged out so long. *Hearings were scheduled and this matter is pending in the courts, and I feel it is wholly unnecessary to go on.*" (Page 273 of Hearings before Special Committee to Investigate Executive agencies; House of Representatives, 79 Congress, 2nd Session, pursuant to H. Res. 88.)

“Mr. Lee: . . . when this is finally determined in court, I am sure, quite confident, that it will be determined favorable to the Federal Home Loan Bank Administration. . . .” [R. 192-193.]

By the express terms of the Administrative Procedure Act, “any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute shall be entitled to judicial review thereof.” (Title 5, Section 1009, U. S. C. Sub. 10(a). (For legislative history of Section 10, Administrative Procedure Act, see Appendix, pages 311 to 318.)

The right of review by a Court of a void or erroneous action by an agency such as appellants, existed prior to the enactment of the Administrative Procedure Act. This was recognized by the U. S. Supreme Court in the 1946-1947 appeals and writs in this very litigation (Fahey v. Mallonee, 332 U. S. 245, 91 L. Ed. 2030—1947; Ex parte Fahey, 332 U. S. 258, 91 L. Ed. 2041—1947), when, after citing the section of the Administrative Procedure Act above quoted, the U. S. Supreme Court said:

“Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies.”

As part of this quotation, the Supreme Court referred to its prior decisions in Starks v. Wickard, 321 U. S. 288, and Federal Reserve Board v. Agnew, 329 U. S. 441.

Stark v. Wickard, 321 U. S. 288, 88 L. Ed. 733 (1943),

was squarely in point on judicial review. It involved an action by producers of milk who were, because of rulings of the Secretary of Agriculture, which they claimed to be erroneous and beyond the Secretary's powers, receiving a lesser price for the milk which they sold. The Secretary, after hearing, had made the order of which appellants complain. The action was brought on behalf of the class of all milk producers similarly affected. The Agriculture Marketing and Agreement Act of 1937 provided in Section 8C(15)(B) for jurisdiction in equity in the district courts of the United States to review certain of the orders of the Secretary of Agriculture. The orders involved were not of the class for which judicial review was provided by the terms of the act. Therefore appellant Secretary of Agriculture moved for, and the district court granted, dismissal of the action, holding the Secretary not reviewable by any Court. The judgment of dismissal was affirmed by U. S. Court of Appeals for the District of Columbia. The U. S. Supreme Court reversed and said in part:

"We deem it clear that on the allegations of the complaint these producers have such a personal claim as justifies judicial consideration. It is much more definite and personal than the right of complainants to judicial consideration of their objections to regulations, which this Court upheld in *Columbia Broadcasting System v. United States*, 316 U. S. 407, 86 L. ed. 1563, 62 S. Ct. 1194. . . ."

Section 5(d) of the H. O. L. C. Act (12 U. S. C. 1461), the Act of Congress considered in our 1947 U. S. Supreme Court decision, does not either by its terms or

by implication, prevent judicial review. It merely authorizes the Federal Home Loan Bank Board to adopt rules and regulations for creation of Federal Savings and Loan Associations.

The U. S. Supreme Court, in *Stark v. Wickard*, also said:

“ . . . There is no direct judicial review granted by this statute for these proceedings. The authority for a judicial examination of the validity of the Secretary's action is found in the existence of courts and the intent of Congress as deduced from the statutes and precedents as hereinafter considered.

“ . . . With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue. (Citing authorities.) . . . Here, there is no forum, other than the ordinary courts, to hear this complaint. When as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. . . . ”

“ . . . But under Article 3, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.” (Emphasis added.)

The claim of being beyond the power of all courts, made by appellants in our present appeals was likewise made by the Federal Reserve Board in one of the U. S. Supreme Court prior decisions, cited in our own *Mallonee v. Fahey* first appeal to the U. S. Supreme Court in 1947. The case was:

Board of Governors of the Federal Reserve System v. Agnew, 329 U. S. 441, 91 L. Ed. 408 (1947).

There the Board of Governors had removed Agnew and others as directors of a National Bank upon the grounds that they were partners in a stock brokerage firm. A bank director being such partner was prohibited by one of the sections of the National Banking Act.

The removed directors brought suit in the district court to review the action of the Board and TO ENJOIN ITS ACTION. The District Court dismissed the complaint. The Court of Appeals reversed but was divided on the question. The U. S. Supreme Court reversed the District Court and held that an injunction could be issued and the case should be considered on the merits.

The U. S. Supreme Court said:

“First. The Board contends that the removal orders of the Board made under §30 are not subject to judicial review in the absence of a charge of fraud. It relies on the absence of an express right of review and on the nature of the federal bank supervisory scheme of which §30 is an integral part. Cf. *Adams v. Nagle*, 303 U. S. 532, 82 L. ed. 999, 58 S. Ct. 687; *Switchmen’s Union of N. A. v. National Mediation Bd.*, 320 U. S. 297, 88 L. ed. 61, 64 S. Ct. 95; *Estep v. United States*, 327 U. S. 114, 90 L. ed. 567, 66 S. Ct. 423. A majority of the Court, however,

is of the opinion that the determination of the extent of the authority granted the Board to issue removal orders under §30 of the Act is subject to judicial review and that the District Court is authorized to enjoin the removal if the Board transcends its bounds and acts beyond the limits of its statutory grant of authority (citing authorities) . . . That being decided, it seems plain that the claim to the office of director is such a personal one as warrants judicial consideration of the controversy. (Citing authorities.)”

An administrative order must be justified by the findings or grounds therein stated or it will be reversed. A case illustrating this is:

S. E. C. v. Chenery,

which was before the U. S. Supreme Court on two successive appeals: The first in 1943—318 U. S. 80, 87 L. Ed. 626; the second in 1947—332 U. S. 194, 91 L. Ed. 1995.

In the 1943 decision (318 U. S. 80), the Supreme Court said:

“ . . . The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.

“In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct ‘although the lower court relief upon a wrong ground or gave a wrong reason.’ . . . But it is also familiar appellate procedure that where the correctness of the lower court’s decision depends upon a determination of fact

which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment . . .”

“ . . . But the difficulty remains that the considerations urged here in support of the Commission’s order were not those upon which its action was based. . . .”

“ . . . Its action must be measured by what the Commission did, not by what it might have done. It is not for us to determine independently what is ‘detrimental to the public interest or the interest of investors or consumers’ or ‘fair or equitable’ . . . The Commission’s action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order. . . . There must be such a responsible finding. (Citing authorities.) There is no such finding here. . . . In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. . . . We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”

In the 1947 decision (332 U. S. 194), the U. S. Supreme Court said:

“When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in

dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. . . .”

Finality of administrative finding regardless of any evidence to sustain them was rejected by the U. S. Supreme Court in the case of:

I. C. C. v. Louisville, 227 U. S. 88, 57 L. Ed. 431—(1913).

The statute provided: “if, after hearing, the commission shall be of the opinion . . .,” the I. C. C. contended that its order based on such “opinion” was conclusive and could not be set aside even if the finding was wholly without substantial evidence to support it.

In rejecting this contention the U. S. Supreme Court in its opinion said:

“ . . . A finding without evidence is arbitrary and baseless. And if the government’s contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution’s condemnation of all arbitrary exercise of power.

“In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the ‘indisputable character of the evidence’ (citing authorities) . . . manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain or refute. . . . The Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.”

Findings made without hearing were held reviewable in the case of:

Chicago, etc., R. R. v. Minnesota, 134 U. S. 418,
33 L. Ed. 970 (1890).

The language of the statute under review was:

“That in case the Commission shall find at any time . . . it shall have power and it is hereby authorized and directed to . . .”

In holding such authority unconstitutional, the Court said:

“. . . No hearing is provided for, no summons or notice to the company before the Commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to

introduce witnesses before the Commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears, that prior to the decision of the Commission, the Company appeared before it by its agent, and the Commission investigated . . . yet it does not appear what the character of the investigation was or how the result was arrived at . . .”

“This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States. . . . It deprives the Company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a Railroad Commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.”

The language of Section 26 of the Federal Home Loan Bank Act, Title 12, Section 1446, U. S. C., reads:

“Whenever the Board finds”

The language above held unconstitutional reads:

“that in case the Commission shall at any time find. . . .”

Neither section provides for any notice or hearing to the parties to be affected by what is found. As the Supreme Court said “nothing which has the semblance of due process of law.” Congress can not be presumed to have

intended an unconstitutional enactment. The findings of the Home Loan Bank Board therefore must be subject to judicial review.

Confiscation of property rights (even the right of possession) without hearing was reversed in:

Garfield v. United States, 53 L. Ed. 168, 211 U. S. 249 (1908).

Plaintiff received from the Secretary of the Interior a certificate of allotment of certain Indian tribal lands, upon which he went into possession of 320 acres. HE HAD RECEIVED NO PATENT, THEREFORE THE ACTION WAS NOT FINAL. Without notice or hearing and without the knowledge of plaintiff, the Secretary erased plaintiff's name from the rolls and cancelled plaintiff's allotment certificate.

The Secretary defended on the ground that Congress had given him exclusive power and the courts could not review his action.

The U. S. Supreme Court affirmed the decision requiring restoration of the cancelled allotment certificate and said:

“In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

“The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the de-

cisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court.” (Emphasis added.)

Even when Congress enacts that the decisions of the administrative agency “shall be final” the courts will yet consider whether or not due process has been denied or if the agency has exceeded its jurisdiction. Such a case was:

Estep v. U. S., 327 U. S. 114, 90 L. Ed. 567
(1946),

wherein the Court said:

“ . . . Thus we start with the statute which makes no provision for judicial review of the actions of the local boards or the appeal agencies. That alone, of course, is not decisive. For the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. (Citing authorities.) . . . Judicial review may indeed be required by the Constitution. (Citing authorities.) . . . the local boards in hearing and determining claims for deferment or exemption must act ‘under rules and regulations prescribed by the President.’ Those rules limit, as well as define, their jurisdiction . . . ”

Again on page 573:

“ . . . We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards

‘final’ as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency. . . .”

In a concurring opinion, Justice Murphy said:

“Before a person may be punished for violating an administrative order due process of law requires that the order be within the authority of the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights. A court having jurisdiction to try such a case has a clear, inherent duty to inquire into these matters so that constitutional rights are not impaired or destroyed. Congress lacks any authority to negative this duty or to command a court to exercise criminal jurisdiction without regard to due process of law or other individual rights. To hold otherwise is to substitute illegal administrative discretion for constitutional safeguards. As this Court has previously said, ‘Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. (Citing authorities.)’”

Further on page 577:

“Due process of law is not dispensed on the basis of what people might have or should have done. The sole issue here is whether due process of law is to be granted now or never. The choice seems obvious.”

Much has been said in appellants’ brief of the “grave necessity” that the confiscation of the Los Angeles Bank, shall not be subject to the tests of constitutional validity in judicial proceedings. There could be no more compell-

ing necessity than the need of a nation at war to raise an army for its defense, yet our highest court has held that even this need can not supersede the constitution.

Administrative agencies are not beyond the reach of the courts, even when given finality as to facts. Such a case is:

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 L. Ed. 90 (U. S. Supreme Court—1902).

Appeal from district courts refusal to enjoin local postmaster from enforcement of fraud order and from dismissal of plaintiff's complaint without trial. The statute reads:

"The Postmaster General, upon evidence satisfactory to him. . . ."

may instruct postmasters to refuse delivery, etc. The lower Court held the Postmaster's action was conclusive and not subject to judicial review.

U. S. Supreme Court, in reversing, said:

"That the conduct of the postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that Department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief . . . we do not mean to preclude the defendant (postmaster) from showing on the trial, if he can, that the business of complainants, as in fact conducted, amounts to a violation of the statutes as herein construed."

Wrongful administrative action was reversed in:

Soc. Sec. Bd. v. Nierotko, 327 U. S. 358, 90 L. Ed. 719 (1946),

wherein the Supreme Court said at page 727:

“. . . Administrative determinations must have a basis in law and must be within the granted authority. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function. . . .

“We conclude, however, that the Board’s interpretation of this statute . . . goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation.”

In

U. S. A. v. I. C. C., 337 U. S. 426, 93 L. Ed. 1451
(U. S. Supreme Court—1949),

the Supreme Court held contrary to earlier decisions that the Interstate Commerce Commission rulings were non-reviewable and in holding such rulings subject to judicial review, said:

“Under the contention the order is final and not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law.

“Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships.” (Citing Administrative Procedure Act, Section 10(a) (Section 1009A, Title 5, U. S. C.) on judicial review, and also citing authorities.)

“And this court has consistently held Commission orders reviewable upon charges that the Commission had exceeded its lawful powers.”

Conclusion—REVIEWABILITY.

That a finding should be made without notice, hearing or trial would of itself appear arbitrary and confiscatory. That such a finding should be made upon evidence gathered in secret with no possibility of the test of cross-examination is contrary to all concepts of judicial process but that finding so made should be final and conclusive and beyond the power of any court to review or reverse is completely dictatorial. It is government by administrative fiat. To state the contention in short language, the Federal Home Loan Banks, Federal Savings and Loan Association and the rights of their depositors, stockholders, creditors and others, exist only at the pleasure or whim of the appellants who at the time of the confiscations consisted of the one man Federal Home Loan Bank Administration. The foregoing Supreme Court decisions are ample precedent for the power of the courts to review and if necessary reverse government by administrative fiat.

V.

**ADMINISTRATIVE REMEDIES ALREADY
EXHAUSTED.**

Appellants insist that the entire five years of litigation outlined in the description of the litigation is all premature because appellees have not “exhausted their administrative remedy.” There was no administrative remedy to exhaust when in December of 1947, appellants heeded the protests of the shareholders, abandoned the administrative hearing then set, made a general appearance before the District Court (in January, 1948), and rescinded the order appointing appellant Ammann as conservator. By ordering appellant Ammann to account with the court, and directing a certified copy of the resolution rescinding the appointment to be filed with the Court, appellants themselves submitted to the Court for decision, all remaining issues.

After such submission by appellants to the Court in January, the Court in March, ordered the appellee Association to amend its pleadings and set forth such matters as the Association had discovered upon being restored to possession of its books and records. The Association promptly did so and the amended cross-claim was filed in May of 1948. [R. 4161-4332.]

At this stage there was no administrative remedy available to any litigant as to any of the issues then submitted and pending before the Court. There have never been any administrative remedies available to the Los Angeles Bank and whatever might have been the status of the earlier administrative hearings for the Association, such hearings were in 1947 abandoned by appellants themselves.

Judicial review of the five previous administrative orders made by appellants in 1946 and 1948 was in progress. Appellants cannot adopt an administrative order in 1948, submitting the issues to the Court for decision and then adopt another administrative order in 1949 withdrawing from the Court, the very issues previously submitted.

Nor, can appellants under the guise of administrative orders, seize control of litigation against themselves and appoint themselves to occupy the positions of both plaintiffs and defendants.

Administrative hearings have their established position in governmental authority, but it is not a position supreme and superior to that of the Courts.

Administrative hearings have never been approved as an appellate procedure to vacate and nullify previous final judgments of the Federal Court against the administrators.

If appellants' position is correct, so long as year after year they continue to adopt successive administrative orders, none of their earlier orders, no matter how final or conclusive in effect they may be, can ever be reviewed by any Court.

If they can appoint a conservator in 1946, remove him in 1948 and suffer a final judgment of removal by the Federal Courts, only to reappoint another conservator or receiver in 1949, probably to again remove this reappointee on the eve of later trial on the merits, the administrators charged with fraud, malice and bad faith, can, by a perpetual succession of administrative orders, completely frustrate and nullify the Administrative Procedure Act, adopted by a long outraged Congress, to curtail and remedy a swelling tide of such administrative abuses.

One of the issues of this appeal is the integrity and validity of a final judgment of a Federal Court, made against appellants on their own confession of judgment. Is that judgment to be vacated and nullified by further administrative action of the losing litigants, or must the losing litigants apply to this Honorable Court of Appeals for the appropriate legal process to review the final judgment?

There comes a time in every administrative proceeding, just as there comes a time in every judicial proceeding, when the parties are entitled to apply for appropriate review to a higher authority.

Whatever may have been the original status in 1946 of the judicial proceeding being reviewed in this appeal from a preliminary injunction, this Honorable Court of Appeals should review the situation as it exists at the time of consideration of the appeal, or at the very earliest, at the time of the granting of the preliminary injunction appealed from.

At the time of the granting of the preliminary injunction appealed from, there had been a chain of administrative orders, most of which were final on their face, and several of which had been the subject of final judgments in the judicial proceedings in the Court below.

These administrative orders were Numbers 5082, 5083 and 5084 adopted March 29, 1946, purporting to liquidate, dissolve and consolidate the \$46,000,000.00 Los Angeles Bank. [R. 8225-8228, Footnote 5.] These orders were not either by regulations or law, subject to any administrative remedies, hearings or proceedings whatsoever. They were, however, subject to judicial review. (See pp. 220 to 235 of this brief.)

Order No. 5254 [R. 8229, Footnote 6], made in May of 1946, made without notice, hearing or trial, for the summary appointment of a conservator for the Long Beach Association, had been carried into effect by appellant Ammann's signing such order, certifying his own appointment as conservator, at the time he confiscated the \$26,000,000.00 of assets of the Association and refused to give any receipts therefor. [R. 3210-3212.]

Order No. 5309, in May of 1946, purported to provide an administrative hearing for the consideration of removal of appellant Ammann as conservator. This hearing was, on December 4, 1947, "postponed indefinitely" by Order No. 139 of Appellant Home Loan Bank Board.

On January 17, 1948, Order No. 388 of the Home Loan Bank Board was adopted, rescinding Order No. 5254, appointing appellant Ammann as conservator. [R. 8231-8232, Footnote 7.]

Order No. 388 likewise removed Ammann as conservator and required him to account with the U. S. District Court, for his twenty month's dealings with the seized \$26,000,000.00 in assets of the Association.

The District Court on January 23, 1948, in reliance upon the certified copy of Home Loan Bank Board Resolution No. 388 (which had been filed with the Court as required by the very terms of said Order No. 388), made its final order and judgment removing appellant Ammann as conservator, quieting the Association's title to its \$26,000,000.00 in assets and properties, requiring appellant Ammann to surrender possession of such assets and to account with plaintiffs and the Court for his twenty months of transactions therewith. [R. 8310-8328.]

This Court order, although objected to by the present appellants, was never appealed from by them or any other party [R. 8274-8275] and was carried into effect by the U. S. Marshal insofar as the assets could be located for enforcement of the order, and the accounting proceedings commenced.

At this stage of the administrative-judicial proceedings, appellants instituted settlement negotiations which lasted for more than a year and one-half. [R. 8239-8241.]

Nineteen months after return of the Association, appellants, unable to coerce the Association into abandonment of its claims for damages for wrongful seizure of the Association (which seizure had been rescinded by appellants themselves), now adopted the eighth in the chain of administrative orders. On September 9, 1949, they adopted Order No. 2015, requiring the Association to show cause before appellants why appellants should not appoint themselves in their guise of Federal Savings and Loan Insurance Corporation as receiver for the liquidation of the Association and for the liquidation of the litigation. [R. 8242-8247, Footnote 11.]

Exhaustion of administrative remedies is a doctrine which, like most other general rules, is subject to exceptions. It does not require that review of erroneous administrative procedure be postponed until review is impossible or fruitless. The party reviewing the administrative procedure alleged to be unlawful, malicious, arbitrary or capricious, is not required to suffer complete destruction of his business and final confiscation of his property before seeking such review.

If the Long Beach Association were compelled to undergo another period of several years of tangled titles for

its borrowers, another \$10,000,000.00 runs of withdrawals, additional hundreds of thousands of dollars of attorneys' fees, and all of the incidental destruction of another conservatorship or receivership, judicial review would very probably come too late to prevent the complete destruction of the Association. [R. 8249-8256.]

There have been other instances of administrative agencies objecting to the Court's preventing destruction of their victims because "administrative remedies had not been exhausted." The Courts, however, have been vigilant to prevent obvious impositions by one litigant upon another under the guise of administrative procedure.

A case exemplifying this doctrine is:

Columbia Broadcasting System v. U. S. A., 316 U. S. 407, 86 L. Ed. 1563 (1942).

Columbia Broadcasting Company maintained a chain of approximately 120 stations throughout the United States, of which about 115 operate by contract with Columbia. The F. C. C. promulgated general regulations requiring refusal of renewal of licenses of all stations entering into certain types of contracts. The contracts so prohibited were the exact type upon which Columbia had founded its chain.

Columbia brought action in equity in U. S. District Courts in New York and sought restraining orders preventing enforcement of the regulations pending judicial review.

The day following filing of the actions in the federal courts, F. C. C. promulgated a "supplement" to its regulations. The effect of which was to grant a station a tem-

porary license while the validity of the regulations was challenged.

Columbia alleged its chain was threatened with ruin, notwithstanding the supplemental regulations, because the broadcasting stations dared not risk their license on a temporary basis in order to maintain their contracts with Columbia.

F. C. C. contended its regulations were not reviewable until it made a final order denying license thereunder. Columbia maintained the effect of the regulation was an illegal confiscation without due process of its broadcasting chain, because its contract stations dared not risk their licenses and go through lengthy judicial proceedings, as the price of maintaining a contract with Columbia.

The U. S. three-judge court at New York dismissed the action and refused the restraining order, but granted an injunction to preserve the *status quo* pending appeal.

The U. S. Supreme Court reversed dismissal of the action and in upholding the injunction, remanded the case to the District Court for trial on the merits. Supreme Court said:

“We need not stop to discuss here the great variety of administrative rulings which, unlike this one, are not reviewable—either because they do not adjudicate rights or declare them legislatively, or because there are adequate administrative remedies which must be pursued before resorting to judicial remedies, or because there is no occasion to resort to equitable remedies. But we should not for that reason fail to discriminate between them and this case in which, because of its peculiar circumstances, all the elements prerequisite to judicial review are present.

The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow . . .” (Emphasis added.)

In April of 1950, when the court below made its allowances on account of attorneys’ fees to counsel for appellees Los Angeles Bank, *et al.*, the records disclosed expenditures for Special Master’s fees, attorneys’ fees, and other costs of litigation aggregating approximately \$500,000.00. Appellants would nullify all of their own ten prior appeals and writs and the 20,000 pages of clerk’s transcript, and set this litigation back to 1946 to commence “administrative hearings” which they themselves abandoned irrevocably in 1947 and 1948. They hope thereby to collaterally and indirectly nullify the final judgments of the court below made against them.

Appellants in September of 1949 decided to seize the Long Beach Association for the second time. They realized that in so doing they would be vacating and setting aside the jurisdiction of the U. S. District Court, and in effect usurping the functions of this Honorable U. S. Court of Appeals. The District Court stated in Conclusion No. 7 of the Preliminary Injunction filed December 1, 1949 [R. 8299] as follows:

“ . . . said order No. 2015 . . . is in effect an attempt by the hearing therein called, for the Home Loan Bank Board to act as an appellate and

reviewing body upon the order of this Court . . . restoring said Association from said conservator to the officers of said Association, as requested by said Order No. 388 of said Board, no appeal from which order was taken and time for which appeal has long since past, . . .”

Neither the court below nor this Honorable Court of Appeals are required to stand idly by while one of the litigants usurps the functions of the appellate court and conducts a hearing to vacate a final judgment which the court below itself could not have vacated. A case refusing to vacate a consent judgment, final from failure to appeal therefrom is:

Walling v. Miller, 138 F. 2d 629 (C. C. A. 8, 1943).

Action was in U. S. District Court by the Wage and Hour Administrator, seeking injunction against violations of the Act and a judgment requiring defendants to pay to their employees back pay for overtime. A stipulation waiving defense and consenting to judgment was filed by the defendants and a consent decree entered, based upon such stipulation.

The action was filed in July of 1941. In January of 1942, after the judgment had become final and time for appeal had expired, defendants filed a motion to vacate the judgment upon the grounds, among others, that the District Court was without jurisdiction to enter a judgment requiring payment of overtime, because the Act did not authorize plaintiff Wage Administrator, to bring such an action. (Only the employees were authorized by the Act to bring suit for overtime.)

In November, 1942, fifteen months after judgment had been entered, the District Court granted the motion vacating the judgment for payment of overtime, upon the ground that the District Court was without jurisdiction to have entered such judgment.

On appeal, the C. C. A. reversed and said:

“ . . . Neither can it be doubted that the court at the time the decree was entered had general jurisdiction of the subject matter and of the parties. The court so found, and no appeal was taken by the defendants from that finding. . . .

“ . . . Assuming, but not deciding, that the administrator is not authorized in the first place to maintain a suit for restitution and that only the employees may do so, the inclusion of the order for restitution in the consent decree did not go to the jurisdiction or power of the court but to the merits only. . . .

“Every court in rendering judgment has the authority and does, tacitly or expressly, determine its jurisdiction over the parties and over the subject matter and its decree sustaining jurisdiction is not open to collateral attack. (Citing authorities.) And when the court which rendered the judgment, having jurisdiction over the subject matter and the parties, has power to adjudicate the issues in the class of suits to which the case belongs, its decision is on the merits . . . and the validity of its judgment, when collaterally attacked, is not affected by an erroneous decision. Such a judgment is not void, even though there be gross error in the decree.”

Administrative remedies cannot be invoked to obstruct proceedings previously pending in the Federal Courts.

The timing of the original court action and the original administrative hearing are vital in these appeals. The seizure of the Long Beach Association was May 20, 1946 [R. 3194]; Action No. 5421-P.H., *Mallonee, et al. v. Fahey, et al.*, was filed in the court below May 27, 1946, by plaintiffs Shareholders Protective Committee of the Long Beach Association. [R. 1-26.]

**THESE PLAINTIFFS SHAREHOLDERS HAD NO
RIGHT TO ANY ADMINISTRATIVE HEARING OR
PROCEDURE.**

The Association on May 30, 1946, AFTER the court action was filed, asked for a "More Definite Statement" and for an administrative hearing. [R. 144.] Appellants Fahey and Ammann, on June 5, 1946, AFTER the court action was commenced, set their administrative hearing for July 1, 1946, at Los Angeles. [R. 147.] Appellants Home Loan Bank Board, successors to Fahey, AFTER the Supreme Court appeals and the remands therefrom, on December 4, 1947, abandoned the administrative hearing, and on January 17, 1948, by Order No. 388, confessed judgment and made a general appearance in the court below.

A case holding that first filing in Federal Court takes precedence over subsequent administration action is:

Dwinell-Wright Co. v. National Fruit Products Co., Inc., 129 F. 2d 848 (C. C. A. 1, 1942).

Plaintiff sued in U. S. District Court to adjudicate ownership of trade-mark. Defendant denied validity of the plaintiff's trade-mark registration and claimed ownership of the registration.

Three weeks after answering in the Federal Court, defendant filed a petition in U. S. Patent Office for cancellation of plaintiff's trade-mark registration. Plaintiff applied to the Patent Office, for a stay of defendant's cancellation proceedings, and moved the U. S. Court for injunction to restrain defendant from prosecuting the cancellation proceedings before Patent Office.

The Examiner-in-Charge in the Patent Office granted plaintiff's motion to stay Patent Office proceedings. Defendant petitioned Commissioner of Patents, who ordered the cancellation proceedings heard immediately.

District Court granted preliminary injunction against Patent Office proceedings, pending trial of the issues pending before the District Court. Neither party had asked the District Court for cancellation of the others trade-mark registrations, but the validity and ownership of the registrations was an issue before the District Court. Defendant appealed to C. C. A. 1, which affirmed and said:

“ ‘It has long been settled that a court of equity which has first taken jurisdiction of a case may, in order to prevent vexatious and harassing litigation, enjoin the parties from further proceeding in another forum . . . Time, expense, and inconvenience may be saved both to litigants and tribunals if the court which first takes jurisdiction of an issue between two parties exercises its power to prevent multiplicity of actions and duplication of effort. It was said in *Gage v. Riverside Trust Co., Ltd., et al.*,

C. C., 86 F. 984, 985, 999, 'The proposition that the court which first acquires jurisdiction of a cause and of the parties thereto will hold and maintain it, in order to settle and end the controversy, does not admit of question.'

“ . . . undoubtedly the rule relied upon by the court below . . . is applicable when two actions are pending in courts of equal dignity within the judicial system of a single sovereignty . . . ”

(And at page 853) the Court then quoted:

“ . . . *Crosley Corp. v. Hazeltine Corp.*, 3 Cir., 122 F. 2d 925, 930, as follows:

“ ‘The Party who first brings a controversy into a court of competent jurisdiction for adjudication should, so far as our dual system permits, be free from the vexation of subsequent litigation over the same subject matter. The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. . . .

“Clearly it is just as harassing and vexatious, and there is just as much waste and duplication of effort involved in twice trying the same issue between the same parties whether the second trial is before an administrative tribunal or before a court, * * *” (Emphasis added.)

“(12) From what has been said the fallacy is apparent in the defendant's argument to the effect

that the injunction granted interfered 'with the Commissioner of Patents in his performance of his statutory duty by denying to him the assistance, testimony and legal advice of appellant and its attorneys.' In view of the nature of the Commissioner's duties in cancellation proceedings, he is impeded by the injunction in the performance of those duties to no greater extent than a court is impeded in the performance of its duties when a party is restrained from proceeding before it."

The Administrative Procedure Act, Section 1009 U. S. C., Title 5, Subdivision (c), Reviewable Acts, provides in part as follows:

" . . . Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been . . . any form of reconsideration," (Emphasis added.)

It is the obvious intent of this language that administrative orders as final as No. 388, removing the conservator, requiring an accounting, and submitting to the general jurisdiction of the court below shall not be subject to action by the agency so as to deprive the court below of jurisdiction acquired by the former final judgments and general appearance of defendants.

VI.

THERE ARE NO INDISPENSABLE PARTIES.

There can be no indispensable or unservable parties to an action *in rem* involving possession and title to real and personal property situated within the territory of the District Court.

The Court having jurisdiction of the *res* summons the parties to come and defend their rights to the *res*. Regardless of whether they appear or default, the Court proceeds to decide ownership and possession of the property. If an owner or possessor of the property is immune from suit, he must respond to the Court and present his claim for immunity, for immunity can be waived. If the claim of immunity is made, the Court must then exercise its jurisdiction to decide whether or not the claimed immunity does actually exist. Such determination is an exercise of jurisdiction by the Court to determine its jurisdiction. Often such jurisdiction can only be determined by a trial on the merits. Such a case was:

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209 (1947).

Plaintiffs sought recovery from defendants, members of the U. S. Maritime Commission, of several million dollars of Dollar Steamship stock held by defendant Commissioners, who claimed ownership and title thereof. Plaintiffs claimed that the stock had only been pledged, that the debt had been paid, and that they therefore were entitled to return of both possession and title to their stock.

The Washington District Court dismissed the action as a suit against the United States. The District of Colum-

bia Court of Appeals reversed, and the U. S. Supreme Court affirmed the Court of Appeals in its holding that the action must be heard on the merits. The Supreme Court said, page 735 U. S.:

“ . . . although as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings, this is the type of case where the question of jurisdiction is dependent on decision of the merits.”

“The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents’ property under the claim that it belongs to the United States”

“If respondents are right in these contentions, their claim rests on their right under general law to recover possession of specific property wrongfully withheld. At common law their suit as pledgors to recover the pledged property on payment of the debt would sound in tort.⁵”

“If viewed in that posture, the case is very close to *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 S. Ct. 240 . . . it concluded that an agent or officer of the United States who acts beyond his authority is answerable for his actions. (Citing authorities.)

“Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 S. Ct. 240, *supra*, has been repeatedly approved. (Citing authorities.) . . . That rule

is applicable here although we assume that record title to the shares is in the Commission”

“. . . But public officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.

“It is in the latter category that the pleadings have cast this case”

“. . . We only hold that the District Court had jurisdiction to determine its jurisdiction by proceeding to a decision on the merits.”

Personal jurisdiction over appellants Home Loan Bank Board, Fahey, *et al.*, exists under the interpleader statutes and by the general appearances made by Order No. 388 removing appellant Ammann as conservator, requiring him to account, etc., a certified copy of which Resolution, by its terms, was to be “forthwith” filed, and was filed with the court below. [R. 3404.] However, without either of these, personal jurisdiction of appellants Fahey, Home Loan Bank Board, *et al.*, is not necessary to the determination by the court below of ownership and possession of real and personal property, physically in the Registry of the Court and within the territory of the district.

In our present *Mallonee v. Fahey* appeal, the original complaints alleged that both the Los Angeles Bank and the Long Beach Association had been wrongfully seized

by defendants claiming to act as officers of the United States. That such seizures were fraudulent and maliciously made, unlawfully and beyond the authority and power of such defendants as officers of the United States. [R. 2, 26; 9466, 9501; 301, 362; 286, 302.]

The undenied allegations of the motions for the appealed injunction are an intent to make a second unlawful and malicious seizure of the Long Beach Association by said defendants, acting beyond their lawful authority and power. [R. 7797, 7809; 7694, 7725; 7659, 7676; 7682.] The language of *Land v. Dollar* is decisive of this appeal. “. . . This is the type of case where the question of jurisdiction is dependent on decision of the merits.”

Our present *Mallonee Fahey* case has not yet been fully decided on all of the merits. The preliminary injunction is issued to preserve the *status quo* until such decision on the merits. Yet appellants seek to attack the jurisdiction of the U. S. District Court at Los Angeles before such decision on the merits. The decision on the merits of necessity will decide the jurisdiction of the Court. If the seizures were as alleged, fraudulent, illegal, unlawful and beyond the authority of the seizing defendants, the District Court has jurisdiction to order return of the property and protect its judgment by injunction.

The Supreme Court said in 1947 in the first decision of *Land v. Dollar*, “The case had not been submitted for decision on the merits. Issue, indeed, had not yet been joined,” and remanded the case to the District Court for further proceedings.

It is significant that during the pendency of the litigation the Maritime Commission threatened to dispose of plaintiff's stock so as to render the issue moot and was enjoined from so doing during the pendency of the litigation by the various courts before whom the action was pending. This preliminary injunction was used as a basis to test the jurisdiction of the District Court.

It is respectfully suggested that the attempt to test jurisdiction of the District Court at Los Angeles, which is "dependent on decision of the merits" should be denied and the matter remanded for full hearings and trial, after which, on the complete record, this Honorable Court of Appeals can itself consider the correctness of the District Courts then decision of its jurisdiction. Certainly jurisdiction is established by the allegations of the complaint sufficient to enable the District Court to hear the merits of those allegations.

Appellants seek to cut off and prevent a trial on the merits before the District Court and to substitute for that trial a hearing before themselves. [R. 8268, Finding 53; R. 8269, Finding 55; R. 8271, Finding 57.] A hearing which the District Court has found is an attempt to exercise appellate jurisdiction. [R. 8297, Conclusion No. 7.] In effect, appellants seek to substitute themselves for this Honorable Court of Appeals as a reviewing body for a proposed reversal of a judgment of the District Court, now nearly two years old, removing one of appellants from possession of real and personal property and placing appellees in possession thereof.

To disguise such a proceeding as an administrative hearing does not alter its true effect.

SUING LOCAL REPRESENTATIVES OF WASHINGTON OFFICE.

Land v. Dollar establishes the authority to sue the principal government officers (the members of the Maritime Commission) without thereby suing the United States. There have been a series of cases taken to the U. S. Supreme Court as a result of, decisions of this Honorable Court of Appeals for the Ninth Circuit.

Situated in the far West, three thousand or more miles from Washington, D. C., the authority of our local District Courts to adjudicate the invalidity of unlawful acts of the local agents of the Washington officers, has been of recurring concern. Two leading cases on that subject are:

Williams v. Fanning, 332 U. S. 490, 92 L. Ed. 95 (Dec., 1947); and

Hynes v. Grimes Packing Company, 337 U. S. 86, 93 L. Ed. 1231 (May, 1949).

Williams v. Fanning, 332 U. S. 490, 92 L. Ed. 95, involved an order by one of the President's cabinet officers, Postmaster General, after a hearing held by him in Washington, D. C., the Postmaster General issued "a fraud order" directing defendant Fanning, the Los Angeles Postmaster, to refuse payment of all money orders drawn to plaintiffs, to stamp as fraudulent and return to the senders all mail addressed to plaintiffs.

The Supreme Court said:

"Petitioners thereupon brought this suit in the District Court for the Southern District of California to enjoin respondent from carrying out the order, claiming that they had been deprived of the hearing to which they were entitled and that the fraud order

was without the support of substantial evidence. On motion of respondent the District Court dismissed the complaint, holding in accord with the view of the Ninth Circuit Court of Appeals that the Postmaster General was an indispensable party. The Circuit Court of Appeals affirmed. 158 F. 2d 95.”

After quoting a number of earlier Supreme Court decisions, the U. S. Supreme Court continues on page 493:

“These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.

“That principle was brought into clearer relief by *Colorado v. Toll*, 268 U. S. 228, 69 L. Ed. 927, 45 S. Ct. 505. There the director of national parks had issued regulations forbidding operation in the Rocky Mountain National Park of automobiles for hire. Toll was the superintendent of the park who was enforcing the regulation. A suit to enjoin him was allowed to be maintained without joining his superior, the director, who had promulgated the regulation. The result followed, 268 U. S. p. 230, 69 L. Ed. 929, 45 S. Ct. 505, by analogy to those cases which permit suit against a public official who invades a private right either by exceeding his authority or by carrying out a mandate of his superior. *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171, 1 S. Ct. 240; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619, 620, 56 L. Ed. 570, 576, 577, 32 S. Ct. 340, . . .

“. . . For a conflict among the circuits developed in these postal fraud cases. *National Conference on Legalizing Lotteries v. Goldman* (C. C. A. 2d N. Y.), 85 F. 2d 66, which held that the Postmaster General must be made a party, suggested that

if he were not, the local postmaster would be left under a command of his superior to do what the court has forbidden. But that seems to us immaterial if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. It seems plain in the present case that that will be the result even though the local postmaster alone is sued. It is he who refuses to pay money orders, who places the stamp 'fraudulent' on the mail, who returns the mail to the senders. If he desists in those acts, the matter is at an end. That is all the relief which petitioners seek. The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the Smith and Fall Cases or indirectly through his subordinate as in the Rutter Case. No concurrence on his part is necessary to make lawful payment of the money orders and release of the mail unstamped. Yet that is all the court is asked to command. Reversed."

Appellees in the present appeals seek removal of defendants from possession of, and title to, their seized real and personal property with the addition in the Long Beach action of preventing a second similar seizure by appellants removed from such possession and control by judgments of the District Court, approximately three years ago. Clearly if the Court below has jurisdiction against the Los Angeles Postmaster to order payment of money orders and delivery of mail on the main floor of the Federal Building at Los Angeles, the same District Court has jurisdiction over the \$14,000,000.00 in the Registry of the Court in possession of the clerk of the Court on the second floor of the same post office building at Los Angeles, California.

If jurisdiction exists over the Postmaster, it certainly must also exist over the court's own clerk who has possession of the \$14,000,000.00.

In our appeals, we have the overwhelming multiplicity of actions by the Homeowners to clear their titles. [R. 8288 to 8291.] Relief to clear California titles is completely beyond the power of any Court at Washington, D. C. If it were necessary in order to obtain jurisdiction to sue the Home Loan Bank Board members at Washington, D. C., jurisdiction would immediately be lost over the appellant San Francisco Bank, the appellees Los Angeles Bank, Title Service Company (the trustee on the thousands of deeds of trust), the 8,000 borrowers, and the hundreds of other parties to this complicated litigation. The Washington, D. C., District Court could not compel them to come to Washington and litigate. Any judgment made by the District Court in Washington, D. C., would have no effect *in rem* on the titles to, or the possession of the thousands of notes, deeds of trust, government bonds, cash, bank accounts and securities, making up the \$70,000,000.00 originally seized from the Los Angeles Bank and the Long Beach Association, all of which remains within the State of California.

This Honorable Court of Appeals for the Ninth Circuit was affirmed in:

Hynes v. Grimes Packing Co., 337 U. S. 86, 93 L. Ed. 1231 (May, 1949).

Secretary of Interior adopted an order in effect depriving the plaintiff Packing Company of the right to catch salmon in certain areas in Alaskan waters.

The District Court for the Territory of Alaska granted an injunction against the enforcement of such regulations.

This Honorable Court of Appeals for the Ninth Circuit affirmed the injunction in *Hynes v. Grimes Packing Co.*, 165 F. 2d 323.

Appellants claimed Secretary of the Interior was an indispensable party. This Honorable Court of Appeals for the Ninth Circuit held the injunction against enforcing officers in Alaska was enforceable without joinder of the Secretary of the Interior in Washington, D. C.

The U. S. Supreme Court, in affirming, said at page 96 U. S. as follows:

“(a) At the outset the United States contends that the Secretary of the Interior is an indispensable party who must be joined as a party defendant in order to give the District Court jurisdiction of this suit. In *Williams v. Fanning*, 332 U. S. 490, 92 L. Ed. 95, 68 S. Ct. 188, the test as to whether a superior official can be dispensed with as a party was stated to be whether ‘the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court.’ P. 494. Such is the precise situation here. Nothing is required of the Secretary; he does not have to perform any act, either directly or indirectly. Respondents merely seek an injunction restraining petitioner from interfering with their fishing. No affirmative action is required of petitioner, and if he and his subordinates cease their interference, respondents have been accorded all the relief which they seek. The issues of the instant suit can be settled by a decree between these parties without having the Secretary of the Interior as a party to the litigation.”

Earlier in the opinion, the Supreme Court mentioned:

“The canners’ investment is substantial, running from two to five hundred thousand dollars respective-

ly . . . These packers employ over four hundred fishermen . . . and over six hundred cannery employees”

In conclusion after upholding the principle that the Secretary of the Interior was not an indispensable party, the U. S. Supreme Court said at page 126 U. S.:

“This is an equitable proceeding in which the respondents seek protection against unlawful action by petitioner, the Regional Director of the Fish and Wildlife Service of the Department of the Interior. The interests of respondents, the Indians of Karluk Reservation, and the efforts of the Department of the Interior to administer its responsibilities fairly to fishermen and Indians are involved. These are questions of public policy which equity is alert to protect. This Court is far removed from the locality and cannot have the understanding of the practical difficulties involved in the conflicts of interest that is possessed by the District Court. Therefore we think it appropriate for us to refrain from now entering a final order disposing definitely of the controversy. With our conclusion on the law as to the establishment of the reservation and the invalidity of the regulation before them, the Department and the parties should have a reasonable time, subject to the action of the District Court on the new proposals, to adjust their affairs so as to comply with our determinations.

“We therefore vacate the decrees of the District Court and the Court of Appeals and remand this proceeding to the District Court with directions to allow thirty days from the issuance of our mandate for the Secretary of the Interior to give consideration to the effect of our decision. Unless steps are taken in this proceeding the District Court, on the

expiration of thirty days, shall enter a decree enjoining the defendant Hynes and all acting in concert with him substantially as ordered in the permanent injunction entered November 6, 1946. If timely steps are taken, the District Court will, of course, be free to enter such orders as it may deem proper and not inconsistent with the present decision. Pending the entry of further orders by the District Court, the preliminary injunction entered July 18, 1946, shall apply to protect the rights of the respondents.”

In this most recent decision by the U. S. Supreme Court on these important questions the rights of a thousand fishermen and cannery employees were considered so important that they were protected by the preliminary injunction pending further action of the District Court and the U. S. Supreme Court said “This Court is far removed from the locality and cannot have the understanding of the practical difficulties involved in the conflicts of interest that is possessed by the District Court. Therefore we think it appropriate for us to refrain from now entering a final order disposing definitively of the controversy.” How much more does this language apply to the complex title tangles with which the Court below has become familiar through 4½ years of consideration of the 20,000 pages of clerks record in the more than 100 hearings held before him in this litigation of *Mallonee v. Fahey*?

The Supreme Court recognized the inequities which it might inflict by attempting to dispose of the rights of salmon fishermen in distant Alaska. In *Mallonee v. Fahey* in 1947, it equally recognized the difficulties of deal-

ing with the rights of the 16,000 depositors and the titles to the homes of the 8,000 borrowers, affected by the peculiarities of California title insurance and trust deed reconveyancing law.

In all cases, it affirmed the rights of the District Court to proceed against the local officers.

In *Williams v. Fanning*, against the local Postmaster, in *Hynes v. Grimes*, against the local representative of the Secretary of the Interior, in *Mallonee v. Fahey* against the conservator, present appellant Ammann. In *Hynes v. Grimes*, in order to compel the Secretary of the Interior to obey its orders, it authorized the District Court of Alaska to "enter a decree enjoining the defendant Hynes and all acting in concert with him substantially as ordered in the permanent injunction," unless timely steps are taken. In the meantime, it left the preliminary injunction in effect.

How much more should this rule apply to the preliminary injunction from which this present appeal is taken in *Mallonee v. Fahey*. The Home Loan Bank Board admits all allegations contained in the motion for preliminary injunction. The motions for the injunctions were verified. Among the grounds stated for the issuance of the injunction, were [R. 7797, 7809, 7694, 7725, 7659, 7676, 7682]:

(1) That the Home Loan Bank Board intended to deliberately cause another run of withdrawals similar to the \$10,000,000.00 run of such withdrawals suffered when the Association was originally seized;

(2) That the Home Loan Bank Board intended to deliberately recloud the titles of the thousands of borrowers as the same were clouded during the twenty months of the previous conservatorship;

(3) That the Home Loan Bank Board intended to liquidate the Long Beach Association and thereby liquidate the litigation and damage claims by said Association against the Home Loan Bank Board;

(4) That the Home Loan Bank Board by appointing itself as receiver for the Long Beach Association, sought thereby to obtain direction and control of such litigation in order to dismiss and terminate the same to the detriment and damage of the 16,000 shareholders who would be the recipients of any recovery made by said Association in such litigation.

In the face of these admissions, the District Court was more than justified in enjoining action by one of the defendants until the full hearing on the merits by the District Court.

Government officials usurping authority they do not have or abusing such discretion as they do have, are persistent and destructive. *Land v. Dollar* did not end with the U. S. Supreme Court decision in 1947. *Williams v. Fanning* continued long after jurisdiction of the District Court at Los Angeles was affirmed by the Supreme Court in 1947. *Hynes v. Grimes* (1950) was the subject of further consideration by this Honorable Court of Appeals only a few weeks ago in January of 1951, when dismissal of the action, denied by the District Court after the Su-

preme Court affirmance, was again appealed to this Honorable Court of Appeals.

Our present case, *Mallonee v. Fahey*, did not end by the confession of judgment by appellants Home Loan Bank Board and removal of appellant Ammann as conservator.

Only twenty months after removing appellant Ammann as conservator, appellants Home Loan Bank Board sought to reseize the appellee Association for the second time.

The injunctions upheld by the U. S. Supreme Court in *Land v. Dollar*, *Hynes v. Grimes*, and authorized in *Williams v. Fanning*, all are ample authority for the Court below in its preliminary injunction attacked on this present appeal.

Once the citizen applies to the courts to protect his property against the encroachment of unlawful administrative action, continuous protection of the citizen, by the Court, is necessary to prevent administrative confiscation not only of the citizen or his property, but of the very right to appeal to a Court for protection.

In many cases such as *Land v. Dollar*, *Hynes v. Grimes* and apparently *Mallonee v. Fahey* also, the administrative agencies attempt to exhaust the citizen and his resources, by prolonging the litigation and thereby skyrocket the expenses. Often the modest resources available to those resisting administrative encroachment can be exhausted by the overwhelming weight of Government bureaus and their unending staffs of counsel, investigators and administrators.

VII.

FINDINGS OF THE COURT ARE CONCLUSIVE.

Appellants on their appeal from a preliminary injunction, made to preserve the jurisdiction of the trial court to finally determine the issues, attack as “without support in the evidence,” 59 of the 84 findings made by the Court below. One of the findings not so attacked is as follows:

“58. That this litigation has proceeded for approximately three and a half years, and has been the subject of two proceedings before the United States Supreme Court, two appeals to the United States Ninth Circuit Court of Appeals, later dismissed, four separate actions (now consolidated or enjoined) either in the California State Superior Court or United States District Court, likewise enjoined, and of hearings on approximately 100 different occasions and proceedings in this Court, each of which lasted from a few hours to several days. Such litigation has been burdensome and expensive to the parties litigant.” [R. 8271.]

On many of the hearings referred to in this finding, present counsel for appellants were not even counsel of record, and of course could not observe the demeanor of the witnesses then testifying. The weight to be given to findings based upon lengthy hearings and knowledge of the case by the trier of the facts, in this instance the district judge who was personally present and presiding on every occasion in which evidence was taken in the then three and one-half years of this litigation, which has

resulted in a clerk's transcript of approximately 25,000 typed pages, is indicated in the case of:

United States of America v. Yellow Cab Company,
338 U. S. 338, 94 L. Ed. 150 (12-5-49) (U. S.
Supreme Court—1949).

Appeal by the Government from an adverse decision by a District Judge and from findings of fact made by such Judge. That case had likewise been the subject of prior appeals to the U. S. Supreme Court, and contained a bulky record consisting of "1674 closely printed pages" and 485 exhibits. The burden of the Government's complaint to the Supreme Court was that the trial court "ignored . . . substantially all of the facts which the Government deemed significant."

The U. S. Supreme Court in affirming the judgment of the trial judge who had presided at the "lengthy hearing extending over three weeks," said in part as follows:

"The first question proposed by the Government is whether the evidence sustains the findings of fact by the District Court. This is the basic issue, and the Government raises no question of law that has an existence independent of it. This issue of fact does not arise upon the trial court's disregard or misunderstanding of some definite and well-established fact. It extends to almost every detail of the decision, the Government saying that the trial court 'ignored . . . substantially all of the facts which the Government deemed significant.'

"What the Government asks, in effect, is that we try the case de novo on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own. Specifications of error which are fundamental to its case ask us to reweigh

the evidence and review findings that are almost entirely concerned with imponderables, such as the intent of parties . . . , whether corporate officers were then acting in personal or official capacities, what was the design and purpose and intent of those who carried out twenty-year-old transactions, and whether they had legitimate business motives or were intending to restrain trade of their competitors”

“The Government suggests that the opinion of the trial court ‘seems to reflect uncritical acceptance of defendants’ evidence and of defendants’ views as to the facts to be given consideration in passing upon the legal issues before the Court.’ We see that it did indeed accept defendants’ evidence and sustained defendants’ view of the facts. But we are unable to discover the slightest justification for the accusation that it did so ‘uncritically.’ Also, it rejected the inferences the Government drew from its documents, but we find no justification for the statement that it ‘ignored’ them”

In our present appeals, the Court below made 84 findings of fact, covering approximately fifty typewritten pages. [R. 8212-8294.] The care thus indicated and the consideration of the record, testimony, and evidence, was similar to that in the *Yellow Cab Company* case, in which the Supreme Court said:

“. . . The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government’s evidence fell short of its allegations—a not uncommon form of litigation

casualty, from which the Government is no more immune than others.

“Only last term we accepted the view then advanced by the Government that for triers of fact totally to reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions. We said ‘We are constrained to reject the court’s conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant. The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the trier of fact . . .’ National Labor Relations Board v. Pittsburgh S.S. Co., 337 U. S. 656, 659, 93 L. Ed. 1602, 1605, 69 S. Ct. 1283.

“Rule 52, Federal Rules of Civil Procedure, provides, among other things:

“‘Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .’”

The issues of our litigation were summarized by the Supreme Court in a prior appeal in this same *Mallonee v. Fahey* case, when it said:

“It is obvious that there is more to this litigation than meets the eye on the pleadings”

Fahey, et al. v. Mallonee, et al., 332 U. S. 245, 91 L. Ed. 2030 (1947).

Since 1947, many of the issues described as then untried have been determined by the Court below as a result of evidence and testimony adduced before it. The language of the Supreme Court is the *U. S. v. Yellow Cab Company* (338 U. S. 338, 94 L. Ed. 150, 12-5-49), has

particular application to appellees' charges that fraud and malice motivated the seizure of the Association when it is remembered that the agents and examiners of the supervising authorities testified before the Court and were subjected to cross-examination [R. 8209, Ftn. 3]:

“Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.”

Throughout this litigation, counsel for appellants have sought to maintain that their clients were immune to all process and suits of any Court, State or Federal. [R. 823, 5073, 6978.] They have ignored restraining orders of the District Court and they presently seek at a hearing before themselves to vacate judgments of the District Court against them. They contend that the findings of that Court are unsupported in the evidence, yet out of a 25,000 page record they designated for printing, ONLY 2546 PAGES. The language of the Supreme Court in the *U. S. v. Yellow Cab Company* case is particularly applicable.

“It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial de novo on the record of such findings as intent, motive, and design.” (Emphasis added.)

A case rivalling our present appeals for length of records, was:

United States v. Aluminum Co. of America, 148 F. 2d 416 (C. C. A. 2, 1945).

in which the U. S. Supreme Court said:

“ . . . Although the plaintiff challenged nearly all of the 407 findings of fact, with negligible exceptions these challenges were directed, not to misstatements of the evidence, but to the judge’s inferences—alleged to be ‘clearly erroneous’ . . .

“ . . . The plaintiff’s brief before us seems to intimate that in doing so he (the Trial Judge) was actuated by a bias in ‘Alcoa’s’ favor; and, if by that is meant that ‘Alcoa’ completely satisfied him of its innocence throughout, bias he certainly showed. That, however, is precisely the bias which all evidence is intended to create, and which it should create, if a Court does its duty. If, on the other hand, it is suggested that into his conclusions there entered motives, not derived from the evidence, the record is utterly devoid of any support for it.

“ . . . in the case of a record of over 40,000 pages like that before us, it is physically impossible for an appellate court to function at all without ascribing some *prima facie* validity to his conclusions . . . what the plaintiff is really asking is that we shall in effect reconsider the whole evidence de novo, as though it had come before us in the first instance . . . whatever may be said in favor of reversing a trial judge’s findings when he has not seen the

witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they ‘must be treated as unassailable.’ (Citing authorities.)

“The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds. (Citing authorities.)” (Emphasis added.)

This rule on findings has long been followed by this Honorable Court of Appeals for the Ninth Circuit:

Wittmayer v. United States, 118 F. 2d 808
(C. C. A 9, 1941).

“(7) The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52(a), 28 U. S. C. A. following section 723c), is but the formulation of a rule long recognized and applied by courts of equity. (Citing authorities.)

“(8) As was said by Mr. Justice Holmes in *Adamson v. Gilliland*, 242 U. S. 350, 353, 37 S. Ct. 169, 170, 61 L. Ed. 356 (citing *Davis v. Schwartz*, 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses ‘depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.’ ” (Emphasis added.)

Goldstein v. Polakoff et al., 135 F. 2d 45 (C. C. A. 9, 1943).

“Almost at the outset appellant states in his opening brief that ‘This appeal is predicated mainly upon the contention that these findings are against the weight of the substantial evidence.’

“ . . . There is, however, nothing before us but a request that we try the case *de novo* on the record. It is true that appellant states in each of his ‘Specifications of Errors’ as to the court’s findings that ‘the finding * * * is against the weight of and not supported by the substantial evidence.’ But in each instance the issue turns upon the trial court’s conclusion from substantial documentary evidence together with highly conflicting testimony of witnesses relating thereto.”

Other decisions by this Honorable Court of Appeals for the Ninth Circuit to the same effect, are:

Occidental Life v. Thomas, 107 F. 2d 876 (C. C. A. 9, 1939);

Cook v. Robinson, 194 Fed. 753 (C. C. A. 9, 1912);

Columbian Ins. v. Quandt, 154 F. 2d 1006 (C. C. A. 9, 1946);

Lincoln Nat. Life v. Mathisen, 150 F. 2d 292 (C. C. A. 9, 1945);

Stimson v. Tarrant, 132 F. 2d 363 (C. C. A. 9, 1942).

In:

Wingate v. Bercut, 146 F. 2d 725 (C. C. A. 9, 1944)

this Honorable Court of Appeals said:

“(8) Appellant attacks two findings on the ground that they are conclusions of law and not finding of ultimate facts. Beyond stating his position he presents no argument to support his claim of error. Therefore, we need not consider the point.” (Emphasis added.)

Appellants on our present appeal have attacked approximately 59 findings but nowhere in their brief have they presented any argument as to conflicting or contrary evidence or lack of evidence to support such findings.

Appellees therefore have not made a detailed analysis of the evidence adduced at the 100 hearings and contained in the over 25,000 pages of clerk's and reporter's transcripts, only 2546 pages of which appellants designated for printing and none of which they have seen fit to comment upon in their briefs.

VIII.

FALSE GROUNDS FOR ADMINISTRATIVE
HEARING.

Order No. 2015 of Appellants Home Loan Bank Board is their attempt to seize for the second time appellee Long Beach Federal Savings and Loan Association, this time for the purpose of liquidation. There are four paragraphs in said Order No. 2015. [R. 8242-8247.]

No. 1 is as follows:

“1. The Long Beach Federal Savings and Loan Association, Long Beach, California, has failed to file the monthly and annual reports required by the Rules and Regulations for the Federal Savings and Loan System;” [R. 8242.]

Such report required an officer of the Association to verify the accuracy of the books and accounts of the institution. For twenty months, appellant Ammann made all entries in such books and accounts. He claims to have indebted the Association for \$6,300,000.00 borrowed by him from appellant San Francisco Bank. He claims to have changed the terms of payment of many of the \$12,000,000.00 of notes and deeds of trust owned by the Association, extending the maturity date, cutting the monthly payments and cutting the interest rates upon such deeds of trust. He claims to have exchanged about \$400,000.00 of stock owned by appellee Long Beach Federal Savings and Loan Association in Los Angeles Bank for stock in appellant San Francisco Bank. He has sold millions of dollars of U. S. Government bonds owned by the Association and has purchased millions of

dollars of other bonds at a different price and maturity. He claims to have paid himself from the assets of the Association for his charges for acting as conservator. Such charges are between \$73,000.00 and \$160,000.00.

These and many other matters too numerous to itemize here, are in dispute between the Association and removed conservator Ammann, in objections to his accounting. [R. 8614-8742.] The Court below, in connection with the Association not filing such reports, found in part as follows:

“65. That it presently appears that defendant A. V. Ammann, as purported conservator of said Association, was in possession of its books, records, accounts, assets and business, for approximately twenty months, from May 20, 1946 to January 24, 1948, during which period of time, all entries made in the books, records and accounts of said Association, were so made by, or under the direction of, the said defendant A. V. Ammann.

“That it is alleged that he made substantial changes in multi-million dollar amounts in various items of the assets and expenses, and capital liability and income columns of said Association’s balance sheets, and books . . .” [R. 8277.]

“66. That each and all of the foregoing, as well as the contentions of the parties, create contingencies, variations and changes in all totals of the columns of assets, liabilities, expenses, income, reserves, surplus, undivided profits and other totals and subtotals in said books, balance sheets and the reports, mentioned in said order 2015, causing binding statements of the same (prior to decision by the Court of the said accounting), to be inappropriate, impractical, and impossible.” [R. 8277.]

“67. That the forms of monthly report required by defendants Home Loan Bank Board and their subordinates, supervisors and examiners, contain the following certification:

“‘I hereby certify that the above report was taken from the books and records of said Association as of the date indicated and to the best of my knowledge is true and correct.’

“That said defendants require such certification to be signed by a responsible officer of the Association, such as its President, Vice-President, Secretary or Assistant-Secretary, and also require the affixing of the seal of said Association, thereby binding and obligating said Association by the statements therein contained. That the giving of the required monthly report, in the form required by said Board, under the circumstances in dispute in this litigation, including the said form of certification, would or might, require said Association to prejudice, waive, or abandon the litigation of the Association’s shareholders in the class action herein brought on behalf of said shareholders, without the consent, agreement, or knowledge of said shareholders, the plaintiffs in this action, suing on behalf of the class of approximately 16,000 of such shareholders, and particularly so because it presently appears that upon the seizure of said Association on May 20, 1946, by said Ammann, all the books and records of said Association were taken possession of by Ammann, without giving any receipts therefor, or any kind of a list or inventory thereof, of any kind or nature whatsoever.”
[R. 8278-8279.]

In essence, if the Association gave the required monthly report, the Association would have abandoned the litigation, waived its damage claims and accepted Ammann’s

accounting as correct, all to the damage and detriment of the Association and its depositors, to the extent of many millions of dollars.

Paragraph No. 2 of Order 2015, is as follows:

“2. Said Association has failed and refused to furnish an affidavit of its president or secretary or other officer that, to the best of his knowledge and belief, the books of said Association correctly reflect the financial condition thereof, as required of all Federal savings and loan associations;” [R. 8243.]

A casual reading of this paragraph would deceive one into believing that no affidavit was given by the Association to the examiners. The Court below found such was not the case. The Court found:

“68. That said Association was examined by approximately seven examiners of defendants Home Loan Bank Board, in charge of Examiner Clifford F. Turner, for approximately 30 days, from July 18th, 1949, to August 17th, 1949, the number of such examiners varying from time to time during said period. That at the conclusion of such examination, an affidavit as to the correctness of said books, and records, of said Association, was required of the officers of said Association. That said Affidavit included verification as to correctness of entries made as to the said disputed items by the defendant A. V. Ammann as purported conservator.” [R. 8279.]

“69. That the President of said Association did make an affidavit as to the correctness of all entries and matters in said books and records of said Association, made or entered by said Associations’ officers

and directors, but said affidavit contained provisos that all such entries were subject to the outcome of the within litigation and said affiant declined to verify the accuracy of the entries in dispute in this litigation, and made by the defendant Ammann as purported conservator.

“That notwithstanding the giving of such qualified affidavit, ground No. 2 of said Order No. 2015, threatens appointment of a receiver for said Association by said defendants.” [R. 8279-8280.]

However, the events at the hearing before the Court were even more startling. The chief examiner of the seven who examined the Association for nearly a month in August, 1949, less than three weeks before the attempt of the second seizure, was called as a witness BY THE ASSOCIATION. His examination report and all notes of his examination were subpoenaed by the Association and placed in evidence. [R. 10931-11001.]

He testified and his examination report disclosed not one criticism of the Association or the conduct of its business. [R. 8211-8212.]

He was asked by Association counsel on cross-examination, if he had not given his own personal receipt in his own handwriting, for an affidavit, sworn to by the President of the Association. He at first denied that he had ever issued such a receipt. It was produced in Court and became Exhibit 11-7-49-No. 3 in evidence at the hearing and is part of the record before this Honorable Court

of Appeals. Confronted with the receipt in his own handwriting and bearing his own signature, appellants' witness admitted the giving of the receipt in his own handwriting, for the affidavit. [R. 10941-42.]

In the face of this evidence, Findings 68 and 69, above quoted by the Court, that such an affidavit was given, are attacked by appellants on this appeal as:

“ . . . clearly erroneous and without support in the evidence.”

In essence, appellants set up as a ground to justify the seizure and liquitation of their antagonist in this litigation, ‘the failure and refusal to furnish an affidavit,’ the receipt for which affidavit in the handwriting of their own chief examiner, was produced in Court. [R. 8211-8212.]

Paragraph No. 3 of said Order No. 2015 is as follows:

“3. Said Association has failed to pay the premiums for insurance of its accounts and the installments thereon due and payable on or about June 5, 1948, December 5, 1948, and June 5, 1949, in the total amount of \$36,487.25, in violation and disregard of the statutes of the United States, the Rules and Regulations for Insurance of Accounts, and its contract with the Federal Savings and Loan Insurance Corporation;” [R. 8243].

To read this ground, one would believe that the Association had made no payments whatsoever. The truth of this matter is that the Association had months previously,

paid into Court, the full sum of \$36,487.25. The Court below as part of its preliminary injunction, found:

“48. That item No. 3 of said Home Loan Bank Board Order No. 2015 alleges that the sum of \$36,487.25 in insurance premiums was not paid. Said statement in Order No. 2015 was made after said \$36,487.25 was deposited, and now is still on deposit in the Registry of this Court, in Interpleader, deposited pursuant to Orders by this Court, for such deposit, after hearing, over the objections of defendants Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, and the various members and trustees thereof, respectively, defendant Ammann conservator, and his or their various deputies or subordinates.” [R. 8266.]

“49. That the time for appeal from such Order of this Court for acceptance of deposit into the Registry of this Court in interpleader, of said sum \$36,487.25, has expired and lapsed, without any appeal therefrom having been taken.” [R. 8266.]

And these findings are not even attacked on this appeal. Appellants admit thereby that they set up as a ground for the second attempt to seize, and this time to liquidate the Association for non-payment of \$36,487.25, which they knew was on deposit in the registry of the Court below, awaiting their obtaining a judgment from the Court that they were entitled to that sum of money.

The U. S. Supreme Court in *Dugas v. American Surety*, 200 U. S. 414, 81 L. Ed. 727 (1936), in describing a

payment into Court similar to that made by the appellee Association, said:

“In the interpleader suit there was an actual, complete and judicially sanctioned payment . . . While the payment was into the court’s registry, and not directly to the claimants, it nevertheless was a lawful and effective payment under the Interpleader Act. In effect the first decree converted the claims . . . into claims against the fund paid into the registry; . . .”

Defiance of the interpleader jurisdiction of the U. S. Court by an attempt to confiscate and liquidate a party to the litigation who had deposited pursuant to order of that Court, the full amount in dispute, warranted not only an injunction to prevent such confiscation, but punishment for contempt of the process of the Court in which the money was interplead.

The below Court also found:

“64. That the only amounts of money disclosed in said Order No. 2015 in any of the four grounds or reasons therein contained is the said sum of \$36,487.25, which sum, in cash, is already on deposit in the Registry of this Court, in excess of, and above the amount of said \$1,000,000.00 surety company bond. That the deposit in Court of said \$36,487.25, of disputed insurance premiums by said Association, adequately protects the interest of said Federal Savings and Loan Insurance Corporation pending adjudication of the issues of this cause, and that said \$1,000,000.00 bond adequately protects said Association and its shareholders, borrowers and others

doing business with it, pending the hearing by this Court on the merits of the issues pending herein awaiting trial.” [R. 8276.]

This finding is appealed from as not sustained by the evidence. Yet appellants have not introduced any evidence whatsoever to the Court below or otherwise, of any harm or damage they would suffer from the \$36,487.25 remaining on deposit in the Registry of the Court until appellants prove they were entitled to receive the same.

Paragraph No. 4 of said Order No. 2015 is as follows:

“4. Said Association and its officers have committed and are committing other violations of law and regulations, including violations set out in the More Definite Statement submitted to said Association on May 29, 1946, and have pursued and are pursuing a course that is jeopardizing and injurious to the interests of its members, creditors, and the public;” [R. 8243].

Except insofar as this attempts to repeat the charges claimed to have justified the first seizure, no facts whatsoever are alleged or presented. For three and a half years, appellants had every opportunity to present the prior charges to the Court below for determination. Rather than do so, they rescinded the order removing the conservator, restored such of the Association’s assets as remained in possession of the conservator, directed him to account with the Court below, and ordered a certified

copy of such rescission, etc., to be filed with the Court below, upon which a final judgment was entered January 23, 1948. [R. 8310.]

In connection with this assertion, the Court below found in part, as follows:

“47. . . .

“That as to the items set forth in its charge, arabic numeral No. 4 of said Order No. 2015, not included in the asserted violations set out in the ‘More Definite Statement’ submitted to said Association on May 29th, 1946, which other charges are to the general effect that the Association and its officers will commit, and have committed other violations of rules and regulations, and have pursued and are pursuing a course that is jeopardizing and injurious to the interests of its members, creditors and the public; full opportunity was given at the said hearing before this Court to present any and all charges of any matters concerning any wrongdoings, whether in violation of the rules and regulations, or otherwise, on the part of said Association and its officers, and no evidence was proffered in support thereof, or was any offer of proof made, so as to enable this Court in the exercise of its general equity powers to determine whether or not such powers should be exercised in any fashion whatsoever, for the preservation of the assets of said Association, or the assets and properties of its shareholder depositors or borrowers, or of its creditors, or of the Home Loan Bank Board, or the Federal Savings and Loan Insurance Corporation, or the public.” [R. 8264.]

The Court further found:

“35. That the process and powers of this Court are available to said Home Loan Bank Board to protect and preserve the public interest and rights involved in, or necessarily collateral to, this litigation, and to compel the performance of any alleged unfulfilled duty of said Association, or any other litigant herein, as well as to protect and preserve the assets and rights of the shareholder members and depositors and borrowers from, and other persons doing business with said Association.” [R. 8256.]

“78. That time for appeal from said Order and Judgment of this Court, dated January 23, 1948, has long since expired without any appeal therefrom having been taken. That said defendants have made no efforts or taken any proceedings to vacate or set aside said judgment before this or any other court.” [R. 8284.]

Neither Findings No. 35, nor No. 78, above quoted, have been attacked in any way on this appeal. They are therefore admitted and it is the law of this appeal that appellants refused to apply to the Court to either vacate said final judgment or in any way protect the depositors of the Association or the public. Instead, appellant themselves, undertook to vacate a final judgment by the Court below against them, remove the litigant awarded possession by such final judgment, and to seize and liquidate their antagonist in the litigation, thereby vacating the Court's judgment and terminating the litigation regardless of the jurisdiction of the Court.

IX.

THE PRELIMINARY INJUNCTION WAS
PROPER.

AS NECESSARY AND APPROPRIATE PROCESS TO
PRESERVE STATUS AND RIGHTS PENDING CON-
CLUSION OF REVIEW PROCEEDINGS, PENDING
BEFORE THE COURT BELOW.

The Association was summarily seized without notice, hearing or trial in May of 1946, upon charges of mismanagement.

In connection with the charges of "mismanagement" it is significant to observe that the Association was founded in 1934 with an initial capital of \$7,500.00; that it grew until in 1946 it had approximately \$26,000,000.00 in assets and a surplus of around approximately \$1,300,000.00. This surplus alone was 173 times its initial capital. The Association had uniformly paid dividends at rates varying from $2\frac{1}{2}\%$ to 4% from the date of its founding in 1934 to its seizure in 1946.

This phenomenal twelve year record of growth was continuing on the very eve of confiscation. In April, 1946, the last month before its seizure, the Association gained approximately \$500,000.00 in new deposit investments.

In the first week after its seizure by defendant-appellant Ammann, the run of withdrawals was at the rate of approximately \$1,000,000.00 per day and before the run subsided, it had aggregated approximately \$10,000,000.00.

In the twenty months the defendant-appellant Ammann was in possession of the Association, it not only failed to grow, but did not recover any of the \$10,000,000.00 run.

Upon restoration of the founding management by judgment of the Court below, the interrupted growth was resumed, although at a slower rate. By August of 1949, nineteen months after the restoration of the Association, it had regained the \$10,000,000.00 run of withdrawals it had suffered under Ammann. A chart depicting the ebb and flow of new deposits discloses this situation. [See plate No. 2, page 4; Exhibit in Evidence, 11-7-49-13, Clk. Tr. 14681.]

The Association was again growing at the rate of \$500,000.00 per month. In the month of August, 1949, it obtained \$525,301.23 in new deposits.

At this stage of the litigation, three years and four months after the commencement of the litigation, one year and eight months after restoration of the Association by judgment of this Court below, and while five previous orders of the defendants were yet under review by the Court below, defendants Home Loan Bank Board adopted their Order No. 2015, providing for a hearing before themselves for the appointment of themselves (Federal Savings and Loan Insurance Corporation) as receiver for the liquidation of the prosperous and growing Long Beach Association.

Appellants Divers, Adams and LaRoque, the Home Loan Bank Board, are the sole governing authorities of appellant Federal Savings and Loan Insurance Corporation. [R. 6478-6479.] They are its board of trustees. They are the defendants against whom the Court, on January 23, 1948, entered its judgment for the restoration of the Association, its assets, premises and business. Their agent Ammann was, by said court judgment, removed from the possession and control of said Association, which he

had obtained and held under claimed authority of appellants.

By order 2015, appellants sought to appoint themselves as receivers for the liquidation of the litigation against themselves, and thereby to vacate the prior final judgment of the District Court, removing their agent from possession of the Long Beach Association.

The Administrative Procedure Act, Title 5, Section 1009 U. S. C. Subdivision (d), reads in part as follows:

“ . . . Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.”
(Emphasis added.)

The Court below, confronted with the attempt of one of the parties litigant to nullify and vacate the Court's prior judgment, and to seize and liquidate the litigant who had obtained such judgment from the Court, took the only possible step to protect the integrity of the Court's judgments and orders.

The judgment which these defendants sought to vacate by their own hearing, was one made on their own confession of judgment and general appearance before the Court below. It was their own resolution filed with the Court below, which resulted in the judgment removing appellants agent Ammann from possession.

The Court below as part of its preliminary injunction, stated as follows [R. 8301]:

“15. That this preliminary injunction, together with the prohibitions and restraints it contains each and all are necessary and appropriate process to postpone in order to prevent immediate and irreparable injury, damage and loss, the matters and things threatened by defendants Home Loan Bank Board by and in their said order No. 2015.

“That such postponement pending the trial on the merits of the matters presented by this litigation and by said Order No. 2015 is required in order to preserve the status and rights of the parties litigant herein, including the approximately 24,000 shareholders and borrowers of said association, pending conclusion by this Court of its trial on the merits of this litigation including a review of adjudication of the various prior orders, regulations and other actions of defendants Home Loan Bank Board *et al.*, and their predecessors.

“That the matters and persons concerned in this litigation and in order No. 2015 are overlapping, co-incidental and mutually inter-related. The decision of one or more of the issues in either likewise involves a decision of one or more of the issues in both said Order No. 2015 and this litigation.” [R. 8301.]

“17. The general equity jurisdiction of this Court to do justice, not piecemeal, nor by halves, and by complete disposition of all parts of litigation, any part of which is properly before this Court, includes jurisdiction to decide all issues in these actions.” [R. 8302.]

The preliminary injunction postponing (until the trial on the merits by the Court below) the destructive action

threatened appellants, was expressly authorized by remedial legislation passed by Congress. Such legislation was the Administrative Procedure Act, Sections 1001 to 1011 inclusive, U. S. C. A. Title 5, Section 1009 U. S. C. A.

The legislative history of the entire Administrative Procedure Act indicates that it was intended to prevent the very action here undertaken by appellants, that is, summary confiscations, attempts to evade the jurisdiction of the Courts, and bureaucratic dictatorship in general.

The act has been upon the statute books for nearly five years during which time many administrative agencies, including the appellants, have flouted its provisions and claim to be exempt from, or not bound by, its remedial restraints.

The United States Supreme Court has recently had occasion to pass upon and deny an agency claim of exemption from the act in the case of:

Wong Yang Sung v. McGrath, 339 U. S. 33,
94 L. Ed. 616 (Feb. 20, 1950).

Immigration Department maintained it was an exception to the act and exempt from its provisions.

The Court said:

“The Administrative Procedure Act of June 11, 1946, *supra*, is a new, basic and comprehensive regulation of procedures in many agencies, more than a few of which can advance arguments that its generalities should not or do not include them. Determination of questions of its coverage may well be approached through consideration of its purposes as disclosed by its background.

“The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.”

The Supreme Court reviewed the legislative background of the Act and said:

“Such were the evils found by disinterested and competent students. Such were the facts before Congress which gave impetus to the demand for the reform which this Act was intended to accomplish. It is the plain duty of the courts, regardless of their views of the wisdom or policy of the act, to construe this remedial legislation to eliminate so far as its text permits the practices it condemns.”

“Turning now to the case before us we find the administrative hearing a perfect exemplification of the practices so unanimously condemned.”

.

“Nor can we accord any weight to the argument that to apply the Act to such hearings will cause inconvenience and added expense to the Immigration Service. Of course it will, as it will to nearly every agency to which it is applied. . . .”

“But the difficulty with any argument premised on the proposition that the deportation statute does not require a hearing, is that without such hearing there would be no constitutional authority for deportation.

The constitutional requirements of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body.
...”

“... We hold that deportation proceedings must conform to the requirements of the Administrative Procedure Act if resulting orders are to have validity. Since the proceeding in the case before us did not comply with these requirements, we sustain the writ of habeas corpus and direct release of the prisoner.”

In our present appeals, the preliminary injunction issued by the Court below was expressly within the language “to preserve status or rights pending conclusion of the review proceedings” (Title 5 Section 1009(d) U. S. C. A.). The review proceedings in the Court below had been pending in the Courts for three years and a half, prior to the adoption of Order No. 2015 on September 9, 1949.

The preliminary injunction appealed from was within the express terms of the act and also within the intent of Congress.

Such Congressional intent is disclosed in the Committee Reports, debates and legislative history. (See appendix, pp. 311 to 318, for legislative history.)

In view of the U. S. Supreme Court pronouncement that the Administrative Procedure Act is to be liberally construed to give effect to those remedial purposes where the evils it was aimed at appear, and considering the legislative history and the committee reports of both the Senate

and the House, together with the plainly expressed language of the Act itself, there can be no doubt of the authority of the Court below to prevent the grave and irreparable injury which appellants admit they intended to inflict upon the appellee Association.

THE PRELIMINARY INJUNCTION WAS PROPER TO PROTECT THE INTEGRITY OF PREVIOUS FINAL AND INTERIM JUDGMENTS OF THE COURT BELOW.

The Court below had inherent as well as statutory jurisdiction and authority to preserve and protect the integrity of its previous final, and interlocutory, orders and judgments, made during the 3½ years of litigation prior to the preliminary injunction attacked on this appeal. Among such orders and judgments affecting the titles of parcels of real property and the possession of millions of dollars of assets and securities including government bonds, cash, promissory notes and similar valuables, are the following:

1. "Order That the Petition of the Shareholders Be Granted and That The Conservator For The Long Beach Federal Saving and Loan Association Be Removed And Its Assets Returned To The Directors And Officers Of The Association",

dated January 23, 1948, which when enforced by the United States Marshal, took, possession and control of approximately \$26,000,000.00 in assets, and the premises, business and management of said Long Beach Association, from the defendants and placed the officers and directors of the Association in such possession and control

thereof. [Exhibit A. of Preliminary Injunction attacked in this appeal. R. 8310.]

2. "Order Requiring Deposit Of Certain Notes, Deeds of Trust, U. S. Government Bonds And Other Collateral Held By The Federal Home Loan Bank of San Francisco."

dated March 13, 1948, which required delivery into the Registry of this Court of the United States Government Bonds, notes and deeds of trust aggregating approximately \$14,000,000.00, which was complied with by the surrender of such \$14,000,000.00 in assets into the Registry of the Court by appellants. [Exhibit F. of Preliminary Injunction attacked in this appeal. R. 8399.]

3. "Order For Delivery of Notes and Trust Deeds (Excess Collateral) From Clerk of Court To Long Beach Federal Savings and Loan Association,"

dated March 26, 1948, which delivered from the Registry of the Court into the possession of said Association and its officers and directors, and transferred the legal title from the other defendants and cross-defendants to said Association, on notes and deeds of trust, having a face value of approximately \$8,500,000.00. [Exhibit H. of Preliminary Injunction attacked in this appeal. R. 8526.]

4. "Findings of Fact, Conclusions of Law and Interlocutory Decree of Injunction",

dated July 30, 1948, which enjoined appellant San Francisco Bank, its officers, directors, attorneys, agents, etc. as well as all other parties to Northern District Court Action No. 28203-G from further prosecution of said

action or from commencing any other action in any other Court to determine or adjudicate any of the issues pending in the Court below. [Exhibit D. of Preliminary Injunction attacked in this appeal. R. 8362.]

5. "Preliminary Injunction Enjoining Prosecution of Remanded Action And Order of Remand,"

dated February 2, 1949, a preliminary injunction enjoining and restraining all parties to the remanded action from any further prosecution of proceedings therein pending adjudication on the merits in the Court below. Among the parties thus enjoined are the present appellants who were named as such parties to said remanded action in cross-claims in interpleader and otherwise by various of the appellees to this appeal. [R. 3465, 9817, 9847, 1948, 9848, 3811, 3939, 3941.]

All of the foregoing, as well as many other orders and judgments, both interlocutory and final of the Court below, would be wholly ineffective, defied and vacated, if appellant Home Loan Bank Board had been permitted to carry out the threats contained in its Order No. 2015.

The parties to this litigation enjoined by the Court below, from litigating elsewhere are, as to some, required to show cause before appellant Home Loan Bank Board, and as to others, invited to intervene, under the threat that if they fail to do so, the issues pending before the Court below will be adjudicated by appellant Home Loan Bank Board in their absence.

Appellant Home Loan Bank Board proposes to appoint itself receiver to vacate the above listed orders and judgments and to take for itself, title and possession of the millions of dollars of property adjudicated thereby.

Appellant Home Loan Bank Board requires the other litigants appellees herein, to “show cause” before such appellant why it should not decide this litigation in favor of itself. This was not only defiance of all power and jurisdiction in the Court below, but was also a direct usurpation of the appellate jurisdiction of this Honorable Court of Appeals. Under the constitution and statutes of the United States vacating of Federal Court judgment is an exercise of a judicial power, which could only be done either by application to the Court below, or by appeal or writ to this Honorable Court of Appeals.

It is indeed significant that after the Court below enjoined appellants from vacating and setting aside its orders and judgments, that then, and only then, did appellants apply to this Honorable Court of Appeals for the extraordinary writs of prohibition, mandamus, etc. to set aside and vacate the very judgments as to which they had, by their Order No. 2015, required the other litigants to “show cause” why appellant Home Loan Bank Board should not vacate. Such writs were denied by this Court of Appeals in June 1950.

The authority of the Court below to protect the integrity and validity of its judgments and orders has been upheld in a long line of United States Supreme Court decisions. Among such cases are:

Looney v. East Texas Rwy. Co., 247 U. S. 216,
62 L. Ed. 1084 (U. S. Supreme Court, 1918).

Appellee railroads were obeying I. C. C.'s Orders as to rates. Attorney General of Texas sought State Court action, inflicting penalties upon railroads for obedience to I. C. C.'s orders.

U. S. District Court granted injunction against the Attorney General who appealed to the Supreme Court, which affirmed and said:

“ . . . our conclusion is that the present status should be maintained until such time as this court may consider all of the grave questions of law and all of the great mass of facts connected with this complicated and important litigation. . . . ”

“The use of the writ of injunction by Federal Courts first acquiring jurisdiction over the parties or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice. (Citing Authorities.)”

Another case wherein the Federal Court, by injunction, protected title to real property acquired under its earlier judgment was:

Julian v. Central Trust Company, 193 U. S. 629, 48 L. Ed. 629 (U. S. Supreme Court, 1904).

Plaintiff purchased real property under a decree of foreclosure of the District Court. Defendant instituted foreclosure proceedings in the State Court after the District Court decree and sought to levy execution under such state proceedings, against the property conveyed by the United States Court's decree.

The sheriff under state proceedings entered upon the property. The purchaser at the District Court foreclosure sale, filed a supplemental bill in the U. S. Foreclosure proceedings, seeking to enjoin interference with purchasers'

title and possession under the judgment of the U. S. Court. In affirming an injunction, the Supreme Court said:

“If the sheriff is allowed to sell the very property conveyed by the Federal decree, such action has the effect to annul and set it aside, because, in the view of the State court, it was ineffectual to pass the title to the purchaser. In such case we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the Federal Court and to render effectual its decree.

“In such cases, where the Federal Court acts in aid of its own jurisdiction and to render its decree effectual, it may . . . restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. (Citing authorities.)”

“Nor is it an answer to say that these judgments were for causes of action arising subsequent to the confirmation of sale. The Federal court by its decree reserved the right to determine what liens or claims should be charged upon the title conveyed by the court. . . . The Federal court, in protecting the purchaser under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun.”

“. . . In such cases the jurisdiction of the court may be invoked by supplemental bill or bill in the nature of a supplemental bill, irrespective of the citizenship of the parties.”

“. . . we are here dealing with a right and title conferred by authority of the decree of a Federal court, which may be virtually set aside and held for naught if the property awarded can be taken upon execution in suits to which the purchaser is not a party.”

The Court below, in its judgment of January 23, 1948, removing appellant Ammann from possession of the Association's assets and business, and restoring the founding management, said:

“ . . . The Court therefore reserves full power both under this order and under its otherwise existing jurisdiction to make all necessary expedient or proper additional or later orders, decrees or judgments.” [R. 8327.]

The injunction appealed from was such a later order, decree, or judgment, made necessary by appellants attempting to violate and vacate the final judgment of the Court below removing appellant Ammann and restoring said Association.

A similar case is:

City of Orangeburg v. Southern Railway Co., 134 F. 2d 890 (C. C. A. 4, 1943).

In affirming an injunction to prevent seizure of possession of property the subject of litigation in Federal Court, the Fourth Circuit said at page 892:

“ . . . under the established rule set out in *Kline v. Burke Const. Co.*, 260 U. S. 266, 43 S. Ct. 79, 67 L. ed. 226, 24 A. L. R. 1077, and in many other decisions, the court, state or federal, which first acquires jurisdiction of the subject matter of a suit *in rem* holds it to the exclusion of any other court until its duty is fully performed, and to that end may enjoin the parties from proceeding in any other court when the effect of the action therein would be to defeat or to impair its own jurisdiction. . . .”

Another Supreme Court decision affirming the power of a Court to enjoin violation of its prior judgments is:

Dugas v. American Surety Company, 300 U. S. 414, 81 L. Ed. 720 (U. S. Supreme Court, 1937).

The Court said:

“The power of the court to enjoin Dugas from further prosecuting his suit in the state court on the appeal bond has full support in §§2 and 3 of the Interpleader Act of 1926 before quoted, as also in settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees.” (Citing authorities.) (Emphasis added.)

THE PRELIMINARY INJUNCTION WAS PROPER TO PREVENT APPELLANTS APPOINTING THEMSELVES RECEIVER OF APPELLEE LONG BEACH ASSOCIATION TO THEREBY LIQUIDATE THE ASSOCIATION AND THE LITIGATION AGAINST APPELLANTS.

Appellants Divers, Adams and LaRoque seek to appoint themselves in their *alter ego* capacity as sole trustees of appellant Federal Savings and Loan Insurance as receiver of appellee Long Beach Association.

In the litigation appellee Long Beach Association is a third-party plaintiff and cross-claimant against said appellee Federal Savings and Loan Insurance Corporation, Divers, Adams and LaRoque, *et al.*, in multi-million dollar disputes, including claims for damages aggregating approximately \$20,000,000.00.

In effect appellants seek to appoint themselves as plaintiffs in litigation to which they are now defendants and thereby to obtain control of such litigation and enabled

themselves to dismiss or discontinue the same to their own advantage and to the irreparable injury of the thousands of depositors, borrowers and customers of said appellee Association.

The Court below found [Finding No. 53, R. 8268]:

“53. That . . . the proposed order for hearing, if given its face effect, is an attempted withdrawal by one of the parties to this litigation, from this court, of many of, if not the major issues involved, and an effort to act upon those issues in its own behalf, without regard to the jurisdiction of this Court or the contentions of the many parties to this litigation who are not parties to such order.”

[And in Conclusion of Law No. 17, R. 8302, the Court said:]

“17. The general equity jurisdiction of this Court to do justice, not piece-meal nor by halves, but by complete disposition of all parts of litigation, any part of which is properly before this Court, includes jurisdiction to decide all issues in these actions.”

The injunction to prevent such gross inequity under the disguise of administrative hearings, was a requirement of any Court of conscience acting as such.

Appellants are each and all totally disqualified to exercise any trustee or fiduciary authority wherein they would decide the prosecution or discontinuance of litigation wherein they are defendants personally involved in multi-million dollar amounts. Their disqualification to act in such fiduciary capacity demonstrates their additional disqualification to act in the judicial capacity of deciding whether or not they or any other receiver, conservator, or other fiduciary, should be appointed for appellees.

Their blunt refusal to submit these issues for consideration to the Court below demonstrates their lack of confidence in the merits of their claims. If a receiver was genuinely necessary, appellants could have obtained from the Court below the appointment of an independent receiver, had they been able or willing to show any necessity for such appointment.

The flimsy pretexts of Items 1 to 4 of Order No. 2015 could bring about the appointment of a receiver for liquidation of a solvent association only if the tribunal deciding such appointment was compelled by the urge to escape personal liability in multi-million dollar damage claims.

The Court below properly refused to permit parties to the litigation to conduct such a hearing.

THE PRELIMINARY INJUNCTION WAS PROPER TO PREVENT APPELLANTS FROM USURPING THE FUNCTIONS OF THIS HONORABLE COURT OF APPEALS AND THEMSELVES VACATING FINAL JUDGMENTS OF THE DISTRICT COURT.

Appellants, by their confession of judgment by Order 388, a certified copy of which under appellants' own seal, was filed with the Court below, brought about the entry of a final judgment, removing appellant Ammann as conservator of appellee Long Beach Association and required Ammann to account to the Court for the seized \$26,000,-000.00.

Appellants assert the right at anytime by their own action an order, to vacate, and nullify the final judgments of the U. S. Courts, to seize and liquidate the successful litigants before said U. S. Courts.

The Court found as part of its preliminary injunction, as follows:

“78. That time for appeal from said Order and Judgment of this Court, dated January 23, 1948, has long since expired without any appeal therefrom having been taken. That said defendants have made no efforts or taken any proceedings to vacate or set aside said judgment before this or any other court.”
[R. 8284.]

This finding is in no way attacked on the appeal and is therefore final and the law of the case.

The Court in Conclusion of Law No. 7 [R. 8299] said in part as follows:

“7. . . . Order No. 2015 by item No. 4 therein set forth, is in effect an attempt by the hearing therein called, for the Home Loan Bank Board to act as an appellate and reviewing body upon the order of this Court dated January 23, 1948, among other things restoring said Association from said conservator to the officers of said Association,”

The appointment of appellants as receiver for the liquidation of the appellee Association, would remove from possession and control of the Association and its assets, those placed in such possession by final judgment of the Court below. Such removal was prevented by the preliminary injunction appealed from, pending final trial on the merits in the Court below of the issues, if any, justifying such removal.

Authority for such injunction to prevent usurpation of, and interference with, the jurisdiction of the District

Court and of this Court of Appeals, is found in the cases of:

Looney v. East Texas Rwy. Co., 247 U. S. 216, 62 L. Ed. 1084 (U. S. Supreme Court, 1918);

Julian v. Central Trust Company, 193 U. S. 93, 48 L. Ed. 629 (U. S. Supreme Court, 1904);

City of Orangeburg v. Southern Railway Co., 134 F. 2d 890 (C. C. A. 4, 1943);

Dugas v. American Surety Company, 300 U. S. 414, 81 L. Ed. 720 (U. S. Supreme Court, 1937);

all quoted on pages 295 to 299 of this brief.

THE PRELIMINARY INJUNCTION WAS PROPER TO PREVENT A MULTIPLICITY AND DUPLICATION OF ACTIONS AND PROCEEDINGS.

The Court below found:

“(f) That to require the officers, witnesses, interested parties, and attorneys, together with such records and documents as may be necessary to produce at said hearing to travel to Washington, D. C., approximately 3,000 miles distant from Los Angeles, California, would constitute a needless burden and a needless duplication of the trial process of this Court and a multiplicity of actions.

“That each and all of said parties may, in the protection of their rights, desire to intervene in said hearing, and may or may not, be, by law, entitled to intervene in said hearing. That to compel them to proceed to Washington, D. C., for the purpose of presenting a petition for intervention, or to attend said hearing, would be a needless and burdensome expense upon each and all of them.” [Finding 34(f), R. 8250-8251.]

“57. That the hearings ordered by said Home Loan Bank Board’s Order No. 2015, interfere with the jurisdiction of this Court and would constitute a duplication of actions and a multiplicity of suits, hearings and proceedings for the decision, hearing and determination of questions, issues and controversies, previously presented to, and either previously decided, or now pending for decision and determination before this Court, in the said cases and matters above captioned. That a multiplicity and duplication of proceedings, suits, hearings and litigation, would cause great, irreparable, immediate and continuing loss, injury and damage, to the parties litigant in these actions now pending before this Court.” [Finding No. 57, R. 8271.]

“59. That there has been allowed on account of such expenses and attorneys charges, sums aggregating in excess of \$260,000.00, in part payment only, all of which allowances have become final by dismissal of appeals or waiver of appeals. That the duplication and multiplicity of trials and proceedings required by said defendant Home Loan Bank Board’s Order No. 2015, would unnecessarily and substantially increase such costs and expenses by many thousands of dollars.” [Finding No. 59, R. 8272.]

The correctness of this Finding No. 59 is not questioned by appellants in any of their specifications of error or points on this appeal.

Jurisdiction of the Court below to prevent such multiplicity and duplications of actions and proceedings, and the waste and expense occasioned thereby, is upheld in the cases of :

This Honorable Court of Appeals for the Ninth Circuit,
in:

Rossetti v. Hill, 162 F. 2d 892 (C. C. A. 9, 1947),
said:

“ . . . The controversy is settled by the sensible
process of bringing all parties into one court pro-
ceeding.” (Emphasis added.)

Dugas v. American Surety Company, 300 U. S.
414, 81 L. Ed. 720 (U. S. Supreme Court, 1937);

Treinies v. Sunshine Mining Co., 308 U. S. 66,
84 L. Ed. 85 (U. S. Supreme Court, 1940);

Mallers v. Equitable Life, 87 F. 2d 233 (C. C. A. 7,
1936);

Maryland Casualty Co. v. Glassell-Taylor, 156 F.
2d 519 (C. C. A. 5, 1946);

U. S. v. Sentinel Insurance, 178 F. 2d 217 (C. C. A.
5, 1949);

all discussed and quoted at greater length in the sections
of this brief on Interpleader, pages 143 to 156, also are
squarely are on this point.

**Preliminary Injunction Was Proper to Prevent Appel-
lants From Vacating the District Court Judgment
Requiring Appellant Ammann to Account for
\$26,000,000.00 Seized Without Receipts.**

By final judgment of January 23, 1948, the Court below
required appellant Ammann to, within 120 days, account
for his twenty months dealings with the seized \$26,000,-
000.00 of Long Beach Association assets and for the con-
duct of its business during that time. More than three
years after such order, Ammann has not yet satisfactorily

accounted. His accounting was rejected by the Court below upon hearing of preliminary objections thereto by appellees, the Shareholders' Protective Committee for Long Beach Association.

Appellant Ammann has been working for over a year with the assistance of as many as eleven F. B. I. accountants in an effort to amend his accounting to the satisfaction of the Court below.

Appellants, by Order No. 2015, seek to, in defiance of the judgment of the Court below, relieve appellant Ammann from the necessity of the accounting to which he appears to be unable to make.

The injunction to prevent such usurpation of the Courts' functions was obviously proper.

THE PRELIMINARY INJUNCTION WAS PROPER TO PREVENT DELIBERATE INFLICTION OF GRAVE AND IRREPARABLE INJURY BY APPELLANTS ON APPELLEES AS COERCION AND INTIMIDATION TO COMPEL ABANDONMENT OF CLAIMS PENDING BEFORE THE COURT BELOW.

In Finding No. 34 [R. 8249] the Court below found in subdivisions (a) to (i), inclusive, thereof, the irreparable loss, damage and injury threatened by appellants and prevented by such preliminary injunction. Throughout this brief we have stated such irreparable injuries. Completely skeletonized, they are:

(a) Undermining public confidence and faith in appellee Long Beach Association, taken from possession of appellants and given to appellees by prior order of the Court below.

(b) Causing fear in the depositors and thereby probably starting another run of withdrawals similar to, or greater than, the \$10,000,000.00 run of such withdrawals previously suffered when appellants first seized the Association in 1946.

(c) Again clouding the titles to the homes of the 8,000 borrowers from said Association, as such titles were previously clouded and rendered unmarketable during the first two years of the litigation.

(d) Needless and wasteful duplication and multiplicity of actions and proceedings.

(e) Violation of Section 5(a), Administrative Procedure Act, Title 5, U. S. C., Section 1004(a), as to convenience of parties and their representatives, by requiring them to travel 3,000 miles to Washington, D. C., to duplicate the trial before the Court below.

(f) Appellants attempting to appoint themselves as receivers for liquidation of the solvent, prosperous and growing appellee Long Beach Association and thereby to liquidate the litigation.

(g) Requiring appellees to waive and abandon this litigation and the damages which they seek, and the contentions which they make. The aggregate total of such amounts exceeds \$20,000,000.00.

Prevention of infliction of such injury, even if accidentally or unintentionally caused, would be justified. The motions for preliminary injunction alleged that appellants would deliberately and willfully inflict such injuries. Such allegations were undenied by appellants in resisting the application for injunction.

The Court below could either grant the preliminary injunction as it did, or step aside and witness the liquidation of one of the litigants before it, by others of the litigants under the guise of an administration hearing.

Such prostitution and abuse of official powers is fortunately not a frequent occurrence in our government. The condemnation by an independent Congressional Investigating Committee of such abuses, the seizure and confiscation of the Los Angeles Bank and the first seizure and attempted confiscation of the Long Beach Association, can be applied with even greater emphasis against the attempted second seizure and threatened liquidation of appellee Long Beach Association.

Ignorance of the consequences of the first confiscation cannot be pleaded as an excuse for the consequences threatened by the second attempted confiscation.

Appellants knew from the prior \$10,000,000.00 run, from the tangled titles, hundreds of thousands of dollars of litigation cost, thousands of pages of printed record, and the multitude of other damages and detriment, exactly what they were undertaking when they scheduled the second seizure of appellee Long Beach Association. Yet their only defense in resisting the preliminary injunction was an attack on the jurisdiction of the Court below to prevent their deliberate ruin of institutions accepting the savings of the public.

Any one of the foregoing grounds would justify the preliminary injunction. All of them combined demonstrate the overpowering necessity of such an injunction if any respect for courts or judicial process is to be maintained.

CONCLUSION.

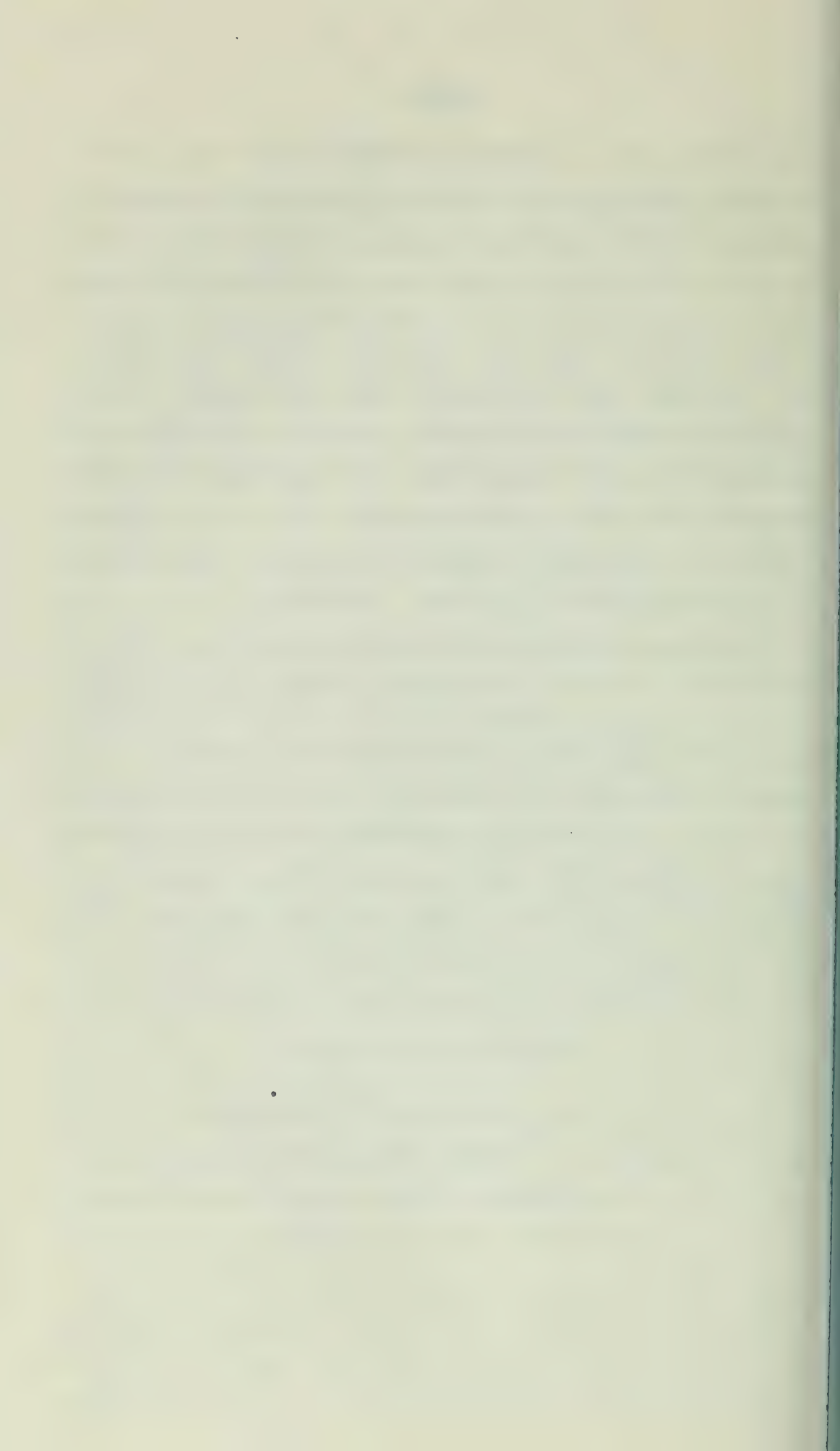
The preliminary injunction appealed from should be affirmed. The Court below had jurisdiction both *in rem* and *in personam*. *In rem* over the \$14,000,000.00 in assets in its registry and \$150,000,000.00 in real and personal property physically situated within its district. *In personam* over appellants who made their general appearance by formal resolution, certified under their seal and filed with the Court, and over appellants personally served within the territorial limits of the court below which in interpleader extends throughout the United States, including the District of Columbia.

No abuse of discretion has been shown in granting a preliminary injunction to prevent another \$10,000,000.00 run of savings withdrawals and another unnumbered years of tangled titles for the 8,000 homeowners. No abuse of discretion was shown by preventing a multiplicity of actions in proceedings duplicating the process of the Court below which have already cost approximately \$500,000.00 in attorneys' fees, costs and expenses. The preliminary injunction should be affirmed and the cases remanded for a trial on the merits of the remaining issues.

Respectfully submitted,

CHARLES K. CHAPMAN,

*Attorney for Appellee Third Party Plaintiff and
Cross-Claimant Below, Long Beach Federal
Savings and Loan Association.*



APPENDIX NUMBER ONE.

LEGISLATIVE HISTORY, SECTION 10, ADMINISTRATIVE
PROCEDURE ACT (1009, Title 5, U. S. C.).

The section is divided into five subsections (a) to (e) inclusive.

Section (a) reads:

“RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

Section (c) reads in part as follows:

“REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . .”

Section (e) reads in part as follows:

“SCOPE OF REVIEW . . . the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing

provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.”

The legislative history of the sections is even more persuasive than the actual language of the sections themselves. In Senate Document No. 248, 79th Congress, Second Session, Legislative History of the Administrative Procedure Act printed at the direction of Honorable Pat McCarran, Chairman of the Senate Judiciary Committee, there occurs in the Report of the Judiciary Committee to the Senate, the following:

In discussing Section 10, Judicial Review, the Committee reports (Page 212):

“Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.”

“. . . where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record.”

In discussing Subsection (e) on Scope of Review, the Committee reports:

“This subsection provides that questions of law are for courts rather than agencies to decide in the last analysis and it also lists the several categories of questions of law . . . ‘Finding’ and ‘conclusion’ also mean failure to find or conclude as the law and the record may require. ‘Short of statutory right’ means that agencies are not authorized to give partial relief where a party demonstrates his right to the whole. ‘Without observance of procedure required by law’ means not only the procedures required by this bill but any other procedures the law may require. . . . Where for example an affected party claims in a judicial proceeding that a rule issued without an administrative hearing (and not required to be issued, after such hearing) is invalid, he may show the facts upon which he predicates such invalidity.

“The requirement of review upon ‘the whole record’ means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case.”

In the report of the Judiciary Committee of the House of Representatives in discussing Section 10 (e) Scope of Court Review the Committee report says (at page 217):

“. . . But the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis.

“It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used. . . . If the agency is proceeding upon a statutory hearing and record, the cause

will appear there; otherwise it must be such that the agency may show the facts and considerations warranting the finding in any proceeding in which the finding is challenged. The same would be true in the case of findings other than of good cause, required in the bill. As has been said, these findings must in the first instance be made by the agency concerned but, in the final analysis, their propriety in law and on the facts must be sustainable upon inquiry by a reviewing court.

“‘Substantial evidence’ means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7(c), and material to the issues. It is exceedingly important. Difficulty has come about by the practice of agencies and courts to rely upon something less—suspicion, surmise, implications, or plainly incredible evidence. Although the agency must do so in the first instance, under this bill it will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment whether on the whole of the proofs brought to their attention the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action or inaction. In reviewing a case under this fifth category the court must base its judgment upon its own review of the entire record or so much thereof as may be cited by any party. . . .

“In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be

tried and determined *de novo* by the reviewing court respecting either the validity or application of such rule or order because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court.”

In the proceedings before the House, Honorable Francis E. Walter, Chairman of Subcommittee No. 3 of the Committee on the Judiciary of the House of Representatives, in commenting upon the scope of review, Section 10(e), said (page 370):

“Where there is no statutory administrative hearing to which review is confined, the facts pertinent to any relevant question of law must of course be tried and determined *de novo* by the reviewing court.

“Whether a court is proceeding upon an administrative or a judicial record, the requirement of review upon the whole record means that courts may not look only to the case presented by one of the parties but must decide upon all of the proofs submitted.”

The application of the Congressional intent as thus disclosed to the proceedings pending in the court below for review of the five final administrative orders is illustrated by the 84 findings and conclusions of the court contained in the Preliminary Injunction, Record 8212 to 8303.

APPENDIX NUMBER TWO.

Honorable Pat McCarran, Chairman of the Senate Judiciary Committee, one of the leading sponsors of the Act, caused the Committee's Reports and Senate and House Proceedings to be printed in a 458 page booklet, officially designated as Senate Document No. 248, Administrative Procedure Act, Legislative History, 79th Congress, Calendar No. 758, Report No. 752. U. S. Government Printing Office.

The report of the Committee on the Judiciary, the U. S. Senate, reads in part, on page 191 under heading II "Approach of the Committee":

" . . . The committee has also taken the position that the bill must reasonably protect private parties even at the risk of some incidental or possible inconvenience to or change in present administrative operations."

On page 213, the exact language re. Interim Relief of Section 10(d) is again quoted with the following comment:

" . . . While it would not permit a court to grant an initial license, it provides intermediate judicial relief for every other situation in order to make judicial review effective. The authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy." (Emphasis added.)

On page 217 under V, "General Comments," the Senate Committee report continues, speaking of judicial review:

" . . . But the enforcement of the bill, by the independent judicial interpretation and application of its terms,

is a function which is clearly conferred upon the courts in the final analysis.

“It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used.

“. . . Judicial review . . . is indispensable since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers not granted.” (Emphasis added.)

After the favorable Senate Committee Report, a similar report was adopted by the House Judiciary Committee.

The report of the Committee in the Judiciary in the House of Representatives in commenting upon Section 10(d) of the Act (Section 1009 U. S. C. A., Title 5(d)) said:

(Page 277):

“. . . statutes authorizing agency action are to be construed to extend rights pending judicial review and the exclusiveness of the administrative remedy is diminished so far as this section operates. While the section would not permit a court to grant an initial license, it provides intermediate judicial relief for every other situation in order to make judicial review effective. The authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy. . . .” (Emphasis added.)

Honorable Senator Pat McCarran, Chairman of the Judiciary Committee of the Senate, in addressing the Senate urging passage of the Administrative Procedure Act, said (at page 327) :

“MR. McCARRAN: . . .

“. . . By enacting this bill, the Congress expressing the will of the people—will be laying down for the guidance of all branches of the Government, and all private interests in the country, a policy respecting the minimum requirements of fair administrative procedure.”

Congressman Walter, Chairman of a Subcommittee of the Committee on the judiciary, in commenting on the report on Section 10(d) said (pp. 369-370) :

“The section is a definite statutory statement and EXTENSION OF RIGHTS PENDING JUDICIAL REVIEW. It thus, so far as necessary, AMENDS STATUTES CONFERRING exclusive authority upon administrative agencies to take or withhold action. Its operation will involve no radical departures from what has generally been regarded as an essential and inherent right of the courts; but, however, that may be, THIS PROVISION CONFERS FULL AUTHORITY TO COURTS TO PROTECT THE REVIEW PROCESS AND PURPOSE OTHERWISE EXPRESSED IN SECTION 10.”

APPENDIX NUMBER THREE.

In the District Court of the United States, Southern District of California, Central Division.

Paul Mallonee, *et al.*, Plaintiffs, vs. John H. Fahey, *et al.*, Defendants. Civil No. 5421—P. H.

Filed Jan. 23, 1948.

ORDER OF REFERENCE TO SPECIAL MASTER.

An order of the above-entitled Court having been made on the 23rd day of January, 1948, effectuating the resolution and order of the Home Loan Bank Board No. 388, dated January 17, 1948, rescinding the conservatorship of the Long Beach Federal Savings and Loan Association and ordering, among other things, the time, place and manner in which said conservatorship shall be terminated, and the management and control of said Association and the assets thereof returned to the Board of Directors of said Association, the holding of a special election of a board of directors and officers of said Association, the form and method of accounting to be made by said conservator to said Association and to the Court, and other matters, and it appearing that exceptional conditions require the appointment of a Special Master to aid and assist in effectuating said order in that the transfer and delivery of the assets of the said Association from the possession of the defendant A. V. Ammann to the possession of the officers and directors of the Association is a task of considerable consequence that will require the constant attention and full-time services of an officer of the Court familiar with the involved and extended litigation and its complexities, and that the effectuation of such transfer without damaging the financial reputation of the Association is important to the community, for the Association has some 16,000 member-savers and

some 8,000 member-borrowers, receives savings of the public, and has assets allegedly totalling some twenty-six million dollars; and the Court further finds that in view of the extended and complex litigation, friction and disagreement will be extremely difficult to avoid and would imperil the financial reputation of the Association and the interests of its shareholders.

It further appears to the Court that because of the extreme complexity of the problems to be determined by such Special Master, it is to the best interests of all of the parties litigant that said Special Master should be one familiar with all of the multifold phases of said litigation from its inception. The Court has, therefore, on its own motion and initiative and without the suggestion of any other person, requested Ronald Walker, Esq., to assume such duties. Each of the principal parties to this action, insofar as it concerns the conservatorship of said Long Beach Federal Savings and Loan Association, has expressed its willingness that Ronald Walker act in such capacity, such consent having been expressed as follows:

By Wyckoff Westover, Esq., on behalf of the plaintiffs Paul Mallonee, *et al.*

By Charles K. Chapman, Esq., on behalf of the Long Beach Federal Savings and Loan Association.

By Hon. James Carter, United States Attorney, on behalf of the defendants John H. Fahey, individually and as former Federal Home Loan Bank Commissioner, A. V. Ammann, individually and as conservator for the Long Beach Federal Savings and Loan Association, all the defendant Government officials, the Home Loan Bank Board, and its predecessor Government agencies and officials.

By W. F. McKenna, Esq., on behalf of the Home Loan Bank Board.

It Is, Therefore, Ordered, Adjudged and Decreed:

1. That Ronald Walker, Esq., be and he hereby is appointed as Special Master in the above-entitled action, to conduct and regulate all proceedings by the parties litigant, or others, pursuant to said order that the conservator for the Long Beach Federal Savings and Loan Association be removed and its assets returned to the directors and officers of the Association, a copy of which said order is appended hereto and by this reference made a part hereof.

2. That said Special Master shall determine the methods of and regulate and supervise the turning over of the assets of the Long Beach Federal Savings and Loan Association by the conservator to the Board of Directors of said Association and the reception thereof by said Board of Directors acting through the officers of said Association, and all matters relating thereto.

3. That the said Special Master shall direct and supervise the special election by shareholders and members of said Long Beach Federal Savings and Loan Association, and all matters relating thereto.

4. That said Special Master shall supervise the proceedings for, and rule upon the adequacy of, the accounting to be made by said conservator pursuant to said order, and all matters relating thereto.

5. That said Special Master shall act as referee between the parties litigant, or any of them, in resolving any controversies which may arise in connection with any of the subject matters of said order and rule thereon.

6. That said Special Master shall at all times have access to the premises of the said Association and its books and records, and shall regulate and control the inspection of the assets, books and records of said Long

Beach Federal Savings and Loan Association in connection with said order of the Court.

7. That said Special Master shall have the power to issue such orders and conduct such meetings, hearings and proceedings as are necessary or appropriate in connection with the said order of the Court.

8. That said Special Master, in addition to the powers herein specified, shall have all of the general powers conferred upon a Special Master under Rule 53 of the Federal Rules of Civil Procedure.

9. That said Special Master shall prepare a report or reports upon all matters herein submitted to him at the conclusion of the proceedings, and from time to time as may be necessary, or as the Court may require.

10. That said Special Master shall have full authority to incur necessary expenses for facilities in connection with said special mastership and to employ and pay all necessary personnel, including, without limiting, stenographers, accountants, shorthand reports, agents and representatives to assist him in the orderly execution and performance of his duties. All such personnel are hereby declared to be casual labor. The Special Master shall, from time to time, file with the clerk an itemization of expenses and liabilities incurred by him, including salaries and fees, and the clerk shall make payments to said Special Master out of the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the Court, in accordance with said itemization.

11. That the compensation of said Special Master shall be fixed by the Court at the conclusion of his services as Special Master and from time to time upon petitions for interim allowances duly presented. All allowances

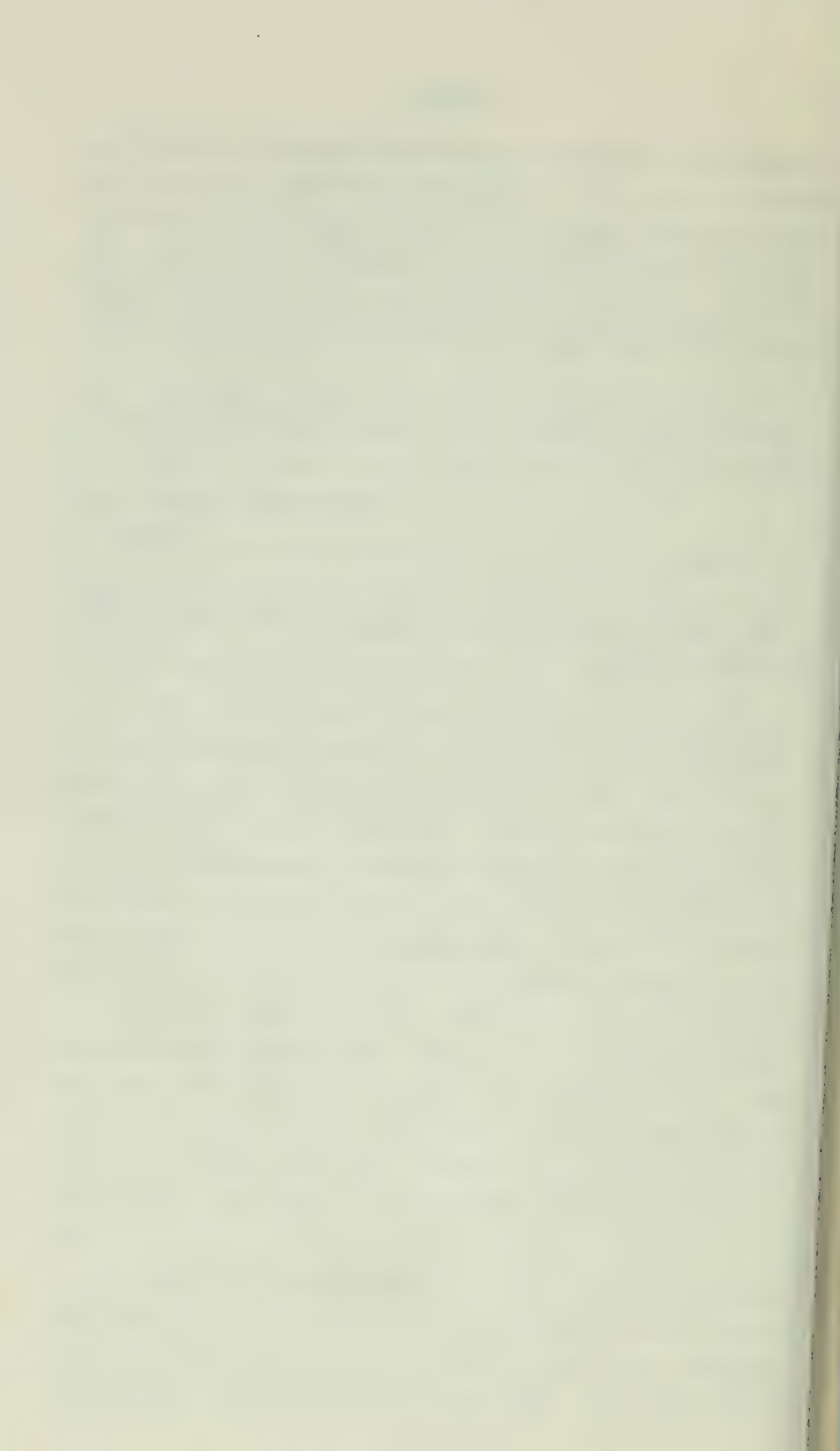
to said Special Master for necessary expenses for facilities, salaries of personnel or otherwise, and for fees, shall be paid from the funds of the Long Beach Federal Savings and Loan Association now on deposit in the Registry of the Court, or from such other assets of said Long Beach Federal Savings and Loan Association as the Court may direct.

Dated at Los Angeles, Calif., this 23rd day of January, 1948.

PEIRSON M. HALL,
Judge.

The undersigned hereby consent to and approve the foregoing Order.

(Photostat)



The undersigned hereby consent to and approve the

Marriage of

of color and

by the

Attorneys for the

Charles

at the

House

according to

and

James M. Carter

U.S. ATTORNEY

William F. McKenna

FOR THE

O'Neil & Myers by John White

Attys for child, party to the suit and also of the Federal Home Loan Bank of Los Angeles

of the



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No. 12511.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LARROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN and GEORGE K. BRAMLEY (Defendants below),
Appellants,

v.

MALLONEE, BUCKLIN and FERGUS, *i. e.*, the SHAREHOLDERS PROTECTIVE COMMITTEE OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION
(Plaintiff in 5421-P.H. below) *et al.*,
Appellees,

— — — — — and consolidated case — — — — —

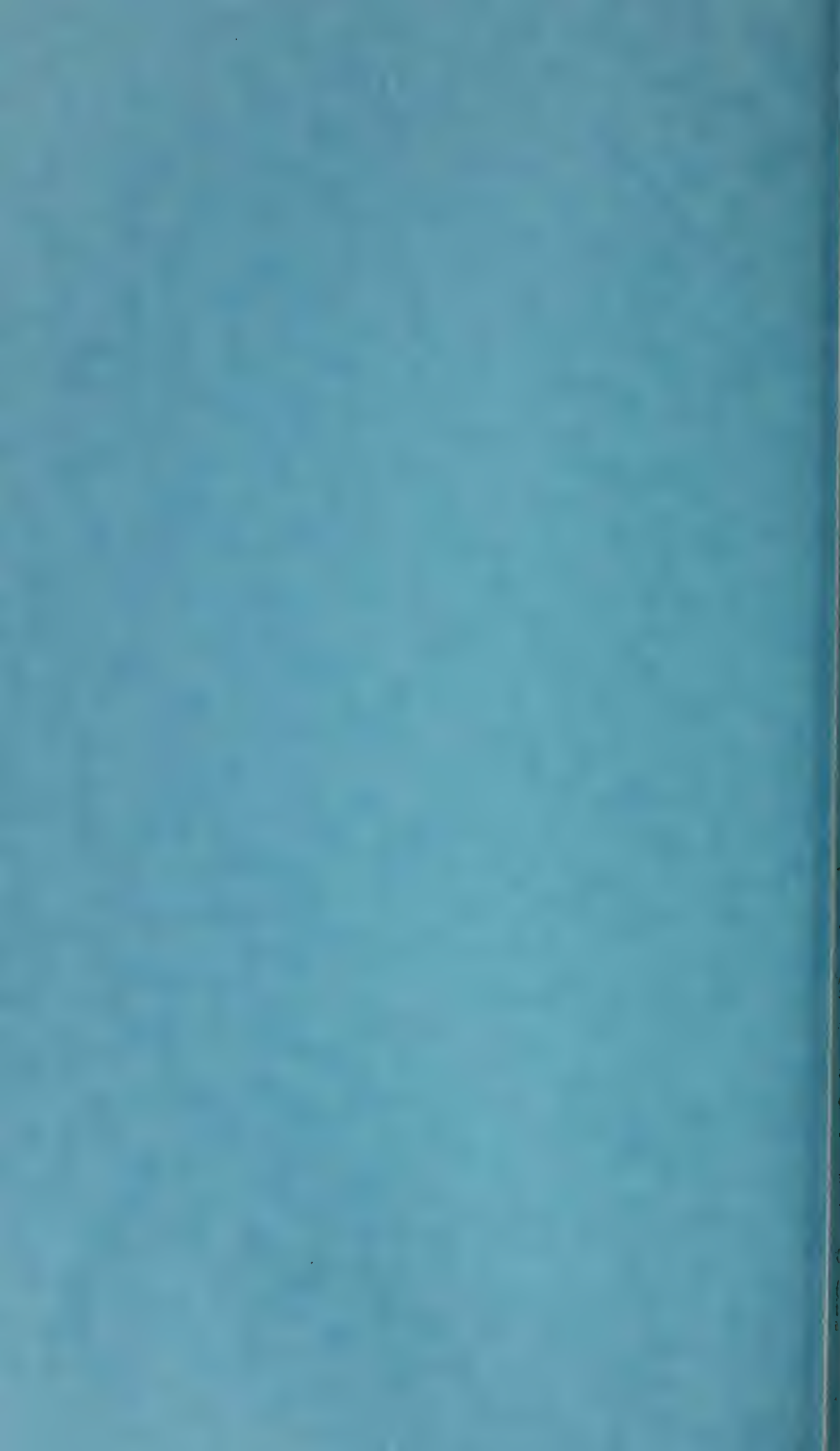
FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.* (Defendants below),
Appellants,

v.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.* (Plaintiffs in 5678-W.M., below),
Appellees.

BRIEF FOR APPELLEE-PLAINTIFF
(Shareholders Protective Committee)

WESTOVER & SMITH,
1009 Pacific Southwest Building, Los Angeles 14,
Attorneys for the Plaintiffs-Appellees.



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Shareholders Protective Committee, Mallonee et al.
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INDEX OF PARTIES AND DESIGNATIONS.

Because of the long and complicated names and the great number of parties involved in this litigation, where the context will permit, they will be variously referred to by the following abbreviated designations, unless the context otherwise indicates:

AMMANN—Refers to A. V. AMMANN, and his co-defendant, George K. Bramley, appellants here (both served within the State of California, and who were at all times the agents of the Home Loan Bank Commissioner, John H. Fahey and his successor, the Home Loan Bank Board, and their alter ego, the Federal Savings and Loan Insurance Corporation. The appellant-defendants, A. V. Ammann and George K. Bramley, were in charge of the seizure of the Long Beach Federal Savings and Loan Association and its assets. They dealt with, and transferred the assets of said association to, their co-defendant-appellant, Federal Home Loan Bank of San Francisco, a “sue and be sued” corporation which also was served within the State of California.

APPELLANTS—(Plural) refers to the appellant-defendants—William K. Divers, O. K. LaRoque, J. Alston Adams, the Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation (who are all one and the same), and to the appellant-defendants, A. V. Ammann, John H. Fahey and George K. Bramley. The three individuals—Divers, LaRoque and Adams, are the individuals who now comprise the Board and are the sole trustees of the Federal Savings and Loan Insurance Corporation (12 U. S. C. 1725 (a)), or “National Housing Act, Sec. 402(a)).

APPELLEE—(Singular) refers to the plaintiff in the original class action (No. 5421-P. H. below), the Shareholders Protective Committee of the Long Beach Federal Savings and Loan Association originally consisting of Mr. Paul Mallonee, C. H. Newhouse and Winnie Bucklin.

Due to the demise of Paul Mallonee and C. H. Newhouse, new members were elected, and the Committee now consists of Flora Mallonee, Mabel Fergus and Winnie Bucklin. The Committee has received written authorization to conduct this litigation from more than fifty per cent of the 16,000 shareholders, and has been licensed by the Division of Corporations of the State of California (1951 California License No. 80282LA).

APPELLEES—(Plural) refers to the appellees here collectively, who are (1) Mallonee *et al.* (the Shareholders Protective Committee of the Long Beach Association), plaintiffs in class action No. 5421-P. H. (below), (2) the Long Beach Federal Savings and Loan Association, third-party plaintiffs and cross-claimants in said action No. 5421-P.H., (3) the Federal Home Loan Bank of Los Angeles, plaintiff in action No. 5678-W.M. (consolidated with No. 5421-P.H.), (4) First Federal Savings and Loan Association of Wilmington, one of the "Six Individual Associations," plaintiffs in said consolidated action 5678-W.M., (5) Title Service Company, cross-claimant in interpleader in action 5421-P.H., (6) George Turner, another cross-claimant in interpleader in action 5421-P.H., and, (7) Robert H. Wallis, cross-claimant in interpleader in action 5421-P.H.

ASSOCIATION—(Singular) refers to the Long Beach Federal Savings and Loan Association, an appellee here, the third-party plaintiff and cross-claimant, in action 5421-P.H. (below), from whom \$26,000,000.00 in assets were seized by the appellants and ordered returned by the U. S. District Court (when necessary to distinguish from other associations, it will be referred to as the "Long Beach Association").

BANK OF LOS ANGELES—refers to the Federal Home Loan Bank of Los Angeles, an appellee here and the third-party defendant and cross-claimant in action

No. 5421-P.H. (below), and the plaintiffs in consolidated action No. 5678-P.H. (below), whose \$46,000,000.00 in assets were seized, and are yet held by appellants-defendants.

BANK OF PORTLAND—refers to the Federal Home Loan Bank of Portland a “sue and be sued” corporation served in California, the appellant-defendant predecessor of the Bank of San Francisco which now holds and claims the title to the charter and assets of the Bank of Portland as well as the assets of the Bank of Los Angeles.

BANK OF SAN FRANCISCO—refers to the appellant-defendant, Federal Home Loan Bank of San Francisco, purportedly created by Federal Home Loan Bank Administration Orders No. 5082-3-4. If it legally exists at all, it is a “sue and be sued” corporation, served in California. It presently claims title to, and has possession of, all of the assets of both the Bank of Los Angeles and the Bank of Portland, whose charter it claims to be operating under.

BOARD—refers to the Home Loan Bank Board (three members) and its predecessor, the Federal Home Loan Bank Board (a.k.a. System, Administration or Commissioner) which consisted of only one man, *i. e.*, the appellant-defendant, John H. Fahey, from February 24, 1942 (Executive Order No. 9070-7 F.R. 1529—abolished the prior five-man bi-partisan board) to July 27, 1947 (Reorganization Plan No. 3-12 F. R. 4981—expanded to the three-man board). The Board is also the “Board of Trustees of the Federal Savings and Loan Insurance Corporation” (Sec. 2(2) of Reorganization Plan No. 3.)

CALIFORNIA APPELLANTS—refers to A. V. Ammann, George K. Bramley and the Federal Home Loan Bank of San Francisco, who are appellants here and defendants (below), who were all served with process in California.

COAST or COAST ASSOCIATION or COAST FEDERAL—refers to the Coast Federal Savings and Loan Association, one of the appellees here and one of the “Six Individual Plaintiffs” in action 5678-W.M. (below), and whose president, Joe Crail, is now a director of the appellant-defendant, Federal Home Loan Bank of San Francisco, a.k.a. Federal Home Loan Bank of Portland.

COMMITTEE—refers to the appellee (singular) *supra*, the Shareholders Protective Committee.

FAHEY—refers to John H. Fahey, an appellant and a defendant in 5421-P.H. (below), who was the former Federal Home Loan Bank Commissioner and sole member of the Home Loan Bank Board and, as such, the sole managing trustee of the Federal Savings and Loan Insurance Corporation (Executive Order No. 9070-7 F.R. 1529, Sec. 1(b), (c), (d), and Sec. 3 (App. Br. p. 140),* until December, 1947.

INSURANCE CORPORATION—refers to the Federal Savings and Loan Insurance Corporation, a “sue and be sued” corporation, an appellant here and a defendant in 5421-P.H. (below) which at all times has been, and now is, doing business within the State of California, collecting premiums from financial institutions throughout the State of California, and, through its agents in California, has been, and is, supervising and dealing with institutions in California (Banks 12 U. S. C. 1725(c) (4)). The present representative and agent of the Federal Savings and Loan Insurance Corporation at Los Angeles, California, is Mr. Frank C. Noon.

INTERVENORS—refers to approximately fifty Home Owner Appellee borrowers who have intervened in action No. 5421-P.H. (below) to clear the titles to more than 400 homes and who have interplead into the Registry of the Court approximately \$1,500,000.00.

*“App. Br. p. 140” refers to the Appellants’ Brief herein.

NORTHERN TEN ASSOCIATIONS—refers to the ten associations located in Northern California, who, in 1948, as plaintiffs, commenced action No. 28203-G in the United States District Court for the northern District of California, Southern Division, involving some of the same properties, issues and parties and which is now enjoined.

PLAINTIFF—(Singular) refers to the appellee (*supra*)—the Shareholders Protective Committee.

SHAREHOLDERS PROTECTIVE COMMITTEE—refers to the appellee (*supra*).

SIX ASSOCIATION PLAINTIFFS—refers to the six individual associations (appellees here), plaintiffs (below), in consolidated action No. 5678-W.M., who sued on behalf of the class of approximately 172 building and loan, and Federal savings and loan associations, stockholders in the seized Bank of Los Angeles.

STOCKHOLDERS' COMMITTEE—refers to the Stockholders' Committee of the Federal Home Loan Bank of Los Angeles—plaintiffs in action 5678-W.M. (below).

TITLE SERVICE—refers to the Title Service Company, an appellee here, and the defendant and cross-complaint in interpleader, in 5421-P.H. (below), who was trustee on approximately \$12,000,000.00 of notes and deeds of trust seized by appellants-defendants.

U. S. DISTRICT COURT—refers to the United States District Court for the Southern District of California, Central Division (Honorable Peirson M. Hall, United States District Judge, has been a respondent before the

United States Supreme Court and before the Court of Appeals for the Ninth Circuit on applications of the appellants for Writs of Prohibition, etc., all of which have been denied.)

WASHINGTON APPELLANTS—refers to the appellant-defendants, Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation; William K. Divers, O. K. LaRoque, J. Alston Adams, who are now both the members of the Board and the sole Trustees of the Corporation, and the defendant-appellant, John H. Fahey, former Home Loan Bank Commissioner, then sole trustee of the Federal Savings and Loan Insurance Corporation, who were all served with process and pleadings in Washington, D. C. In the interest of brevity and as they are all one and the same, they will, whenever possible, be referred to collectively as the “Washington Appellants.”

WILMINGTON ASSOCIATION—refers to the First Federal Savings and Loan Association of Wilmington, an appellee here and one of the six individual association plaintiffs in consolidated Action No. 5678-W.M. (below), suing on behalf of the class of approximately 172 building and loan and Federal savings and loan associations, stockholders in the seized Federal Home Loan Bank of Los Angeles.

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No. 12511.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LA-
ROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, FEDERAL HOME LOAN BANK
OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN and
GEORGE K. BRAMLEY (Defendants below),

Appellants,

v.

MALLONEE, BUCKLIN and FERGUS, *i. e.*, the SHAREHOLDERS
PROTECTIVE COMMITTEE OF THE LONG BEACH FEDERAL
SAVINGS AND LOAN ASSOCIATION

(Plaintiff in 5421-P.H. below) *et al.*,

Appellees,

— — — — — and consolidated case — — — — —

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.* (De-
fendants below),

Appellants,

v.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.* (Plain-
tiffs in 5678-W.M., below),

Appellees.

BRIEF FOR APPELLEE-PLAINTIFF
(Shareholders Protective Committee)

APPEAL

From

PRELIMINARY INJUNCTION WITH FINDINGS
[R. 8194-R. 8555]¹

¹"R." 8194, etc., refers to page numbers in the printed record on this appeal, No. 12511, where the "Preliminary Injunction with Findings" appealed from, appears.

ISSUES

THIS IS A JURISDICTIONAL DISPUTE!

The appellants state:

"The only material issues are:

1. Whether the court below had jurisdiction over the persons of the non-resident defendants *for any* purpose, and
2. Whether *any* of the pleadings state a claim for relief within the jurisdiction of the court below." (App. Br. p. 81.)² (Emphasis and numerals added.)

Apparently, the appellants concede that the U. S. District Court at Los Angeles had general jurisdiction over the action *in rem*, No. 5421-P.H.

The U. S. Supreme Court has twice so decided, (1) *Fahey v. Mallonee*, 332 U. S. 245, (2) *Ex parte Fahey*, 332 U. S. 258 (1947).

This United States Court of Appeals for the 9th Circuit has three times so decided, (1) *Ammann v. Mallonee*, No. 11751—Supersedeas denied; (2) *Fahey, San Francisco Bank, etc. v. U. S. District Judge Hall*—Petition for Writ of Prohibition, Mandamus, etc., denied June 6, 1950, no number; (3) *Fahey v. O'Melveny & Myers, W. I. Gilbert, etc.*, No. 12591—Supersedeas denied.

Three other appeals by the appellants are now pending here in addition to this appeal, No. 12511.

How many more times will the appellants attack the Court's jurisdiction?

Upon this appeal from the granting of a preliminary injunction for the purpose of preserving the "status quo"

²"App. Br." refers to the Appellants' Brief herein.

it must be presumed that the allegations of the complaints are true, at least until such time as trial is had on the merits. *Brooklyn Trust Co. v. Kelby*, 134 F. 2d 105 (1943), certiorari denied, 319 U. S. 767; 87 L. Ed. 1717.

The questions listed by the appellants on pages 21 and 22 of their brief all omit the presumed to be true allegations of a fraudulent conspiracy, whereby California property was fraudulently seized from the California owners.

Adding of the element of fraudulent conspiracy to each of these questions makes the answer to such questions obvious.

We submit that this United States District Court has jurisdiction to hear and determine the allegations of this replevin action for the recovery of property wholly located within its District, owned by parties residing within its District, seized by a fraudulent conspiracy committed within its territorial jurisdiction, by agents, employees, subsidiaries and co-conspirators acting within, and served within, the territorial jurisdiction of the Court, even though the non-resident “master minds” who directed the fraudulent conspiracy were served outside of the State of California, pursuant to appropriate Court Orders.

To now dissolve this Preliminary Injunction, before trial on the merits, would be to permit the appellants to consummate the fraudulent conspiracy of which they are accused.

We address ourselves to the only “material issues” (App. Br. p. 81):

1. “Whether the Court below had jurisdiction over the non-resident defendants, for *any* purpose, and

2. Whether *any* of the pleadings state a claim for relief within the jurisdiction of the Court below.”

SCOPE OF APPEAL.

On an appeal from a Preliminary Injunction the Appellate Court need decide only three issues:

First: Did the trial court have jurisdiction?

Second: Were there any allegations in the pleadings sufficient to sustain any relief?

Third: Was the issuance of a Preliminary Injunction an abuse of the trial court's discretion?

When the Appellate Court finds any allegation in any affirmative pleading entitling any complainant to a trial on the merits, a Preliminary Injunction preserving the status quo pending trial can be affirmed.

In *Deckert v. Independent Shares Corp.*, 311 U. S. 282, 85 L. Ed 189 (1940), in reinstating the Preliminary Injunction granted by the District Court and dissolved by the Circuit Court, the U. S. Supreme Court states:

(Page 289):

"It is enough at this time to determine that the bill contains allegations which, if proved, entitled petitioners to some equitable relief . . . Hence, if the District Court had jurisdiction it was proper to consider whether injunctive relief should be given in aid of the recovery sought by the bill.

.

(Page 290):

We hold that the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill. It is well settled that *the granting of a temporary injunction pending final hearing is within the sound discretion of the trial court.*"

To the same effect, see *Munoz v. Porto Rico Ry. Light & Power Co.*, 83 F. 2d 262 (1936) Certiorari denied, 298 U. S. 689; 80 L. Ed. 1408; *Rogers v. Hill*, 289 U. S. 582, 77 L. Ed. 1385 (1933). It is to the discretion of the trial court, not to that of the Appellate Court, that the law entrusted the granting or refusing of Preliminary Injunctions. The only question is does the proof clearly establish an abuse of the trial court's discretion. *Love v. Atchison, Topeka & Santa Fe Ry. Co.*, 185 Fed. 321 at 331 (1911); *Ohio Oil Co. v. Conway*, 279 U. S. 813, 73 L. Ed. 972 (1929). If abuse of discretion is not clearly established the granting of the Preliminary Injunction must be affirmed.

JURISDICTIONAL STATEMENT.

The U. S. District Court had, and has, jurisdiction of this *quasi in rem* action to replevin property within its territorial jurisdiction. It is alleged the amount involved is approximately \$70,000,000.00 and there is diversity of citizenship (California associations, banks, shareholders and stockholders vs. foreign defendants Ammann of Maryland, Fahey of Massachusetts, Divers of Ohio, La-Roque of North Carolina, Adams of New Jersey, The Home Loan Bank Board and The Federal Savings and Loan Insurance Corporation, claiming residence in Washington, D. C., but doing business in California.) The non-resident defendants have all been served with process, either in California, or pursuant to Court Order for service on absent defendants wherever the U. S. Marshal could find them.

Likewise, many substantial Federal questions were, and still are, present in the action.

Some of the Federal enactments, the validity and construction of which are placed in issue by the pleadings are: (a) "Home Owners Loan Act of 1933" (48 Stat. 128, 12 U. S. C. 1461, etc.), (b) "Federal Home Loan Bank Act" (47 Stat. 725, 12 U. S. C. 1421 *et seq.*), (c) "The National Housing Act" (48 Stat. 1246, 12 U. S. C. 1701, etc.), (d) "The First War Powers Act of 1941" (55 Stat. 838, 50 U. S. C. App. 601) and "Executive Order No. 9070" thereunder, (e) "Reorganization Act of 1945" (59 Stat. 613, 5 U. S. C. 133Y, etc.), (f) Rules, Regulations, Directives and Orders claimed to have been adopted pursuant to the authority of said Acts and many others [R. 2, 287, 323, 566, 2962, 3190, 6738, 6802, 6852, 9466, and others].

The U. S. District Court also has jurisdiction (1) of the property, *i. e.* the *res*, as a local Court acting *in rem*, (2) by quiet title Statute 28 U. S. C. 1655 (Former 118), (3) by interpleader Statute 28 U. S. C. 2361 and Rule 22, F. R. C. P., and (4) by right of judicial review of Administrative Acts impinging upon personal rights, (a) by Administrative Procedure Act 5 U. S. C. 1001, etc., and (b) inherent in Courts of Law.

These appellees concede the U. S. District Court at Los Angeles had, and has, full and complete jurisdiction of the subject matter and parties.

It is not disputed that this 9th Circuit Court of Appeals has jurisdiction of this appeal under 28 U. S. C. 1292, unless this Honorable Appellate Court is of the opinion that the amendment to Rule 54(b), F. R. C. P., (effective March 19, 1948) makes a Preliminary Injunction a non-appealable Order unless it "expressly determines that there is no just reason for delay and expressly directs the

forthwith entry of judgment”, which this Preliminary Injunction here appealed from does not do.

The “Washington Appellants” who were served pursuant to Order of Court for service upon absentee defendants, contend they have not submitted to the U. S. District Court’s jurisdiction, although this appellee contends otherwise. It is submitted that this appeal of the “Washington Appellants” seeking affirmative relief either constitutes their submission to the jurisdiction of the trial court, or the “Washington Appellants” not having submitted themselves to the jurisdiction of the trial court, they could not appeal and their appeal should be dismissed.

Sawyer (Secretary of Commerce) v. Dollar, No. 10868 (C. C. A., D. C.) January 31, 1951—application for review by U. S. Supreme Court pending. *U. S. v. Siegel*, 168 F. 2d 143, 83 U. S. App., D. C. 88 (1948); *Van Sweringen Corp. et al., Eastman et al. v. Leckie*, 180 F. 2d 119 (1950).

NATURE OF THE ACTION.

This is a class action in the nature of replevin, filed on behalf of the shareholders of a solvent “local, mutual thrift institution” (12 U. S. C. 1464 (a)) brought to recover the property of the Association, consisting of realty, notes secured by trust deeds on realty, bonds, cash and other personal property, all located in Southern California. The action seeks to remove the clouds and encumbrances imposed upon said realty and personal property by the wrongful seizure and retaining of said property by the appellants under a wrongful claim of authority.

The same "*modus of operendi*" was used as was used sixty days before by the appellants-defendants in summarily, without notice, hearing or cause, seizing, liquidating and dissolving the solvent Bank of Los Angeles and comingling its assets with the assets of the Bank of Portland, a. k. a. the Bank of San Francisco.

The title to the complaint as amended, states the action is "to cancel the fraudulent and void appointment of conservator, to quiet title, for return of property, for declaratory relief, for accounting and injunction" [R. 2960]. It contains seven causes of action comprising 107 typewritten pages, or 134 printed pages [R. 2960-3094] and the prayer [R. 3088-3094] demands, among other things, that the duly elected officers of the Long Beach Association "be restored to full possession of all of the property and assets of Association"; that the conservator be removed; that title of the appellee (the plaintiff-shareholders) be quieted; that the appellants and each of them be enjoined from asserting any claim to the properties; that all of the defendants (naming a long list of them) and all others who had any possession, control or management of any of the assets of the Association be ordered to account for all such assets and the income therefrom; that the appellants be restrained and enjoined from interfering with the lawful management, possession, control and operation of the Association and its assets; and that all costs, expenses and attorneys' fees incurred in recovering such assets be determined and assessed [R. 3088-3094].

On May 23, 1949, after the officers of the Association regained possession of various bonds, insurance certificates and contracts, a supplement to the first amended and supplemental complaint was filed joining as party defendants, with appropriate allegations, the Home Indemnity Company and the Federal Savings and Loan Insurance Corporation [R. 6798-6846].

The action sounds in replevin to recover the assets of the shareholders of the Long Beach Association wrongfully seized and converted by the Appellants; for the reasonable value of all assets not returned; to quiet title in, and to remove clouds from, the title to the assets recaptured; and for the costs and expenses of recovery.

The complaints as amended state causes of action.

See this appellee's-shareholders Protective Committee, Mallonee, etc., Plaintiff's-complaint [R.2] as amended [R. 2960] and supplemental [R. 6798]; appellee, Long Beach Association's third-party complaint [R. 287] and cross-claim [R. 323] as amended [R. 3188] and supplemental cross-claim [R. 4161] and second cross-claim [R. 6737]; appellee Bank of Los Angeles, cross-claim in 5421—P. H. [R. 564] and complaint in consolidated case 5678—W. M. [R. 9465]; appellee Title Service Company's cross-claim in interpleader [R. 43] and supplements thereto, first [R. 766] and second [R. 995] and third [R. 2305] and fourth [R. 2581]; appellee Robert H. Wallis' cross-claim-in-interpleader [R. 87]; appellee George Turner's cross-claim-in-interpleader [R. 3461] and amendment [R. 3640].

**THE ACTION IS LOCAL IN CHARACTER AND
IN REM IN NATURE.**

DESCRIPTION OF LITIGATION.

This litigation has thus far involved fifteen proceedings in State and Federal, Trial and Appellate Courts, and two Congressional Investigations (one of which is still pending). Such proceedings are:

**In the U. S. District Court, Southern
District of California:**

(1) No. 5421—P. H., commenced May 27, 1946, to recover the Long Beach Association and its assets.

(2) No. 5678—P. H., commenced August 22, 1946, to reactivate the Bank of Los Angeles and to recover its assets.

(3) No. 7989—P. H., commenced February 17, 1948, by only two shareholders—remanded to California State Court and enjoined.

**In the U. S. District Court, Northern
District of California:**

(4) No. 28203—G, commenced July 22, 1948, by ten Northern Associations to prevent settlement—enjoined by U. S. District Court.

**In the Superior Court of the State of California,
In and for the County of Los Angeles:**

(5) No. L. B.—C. 14492, commenced January 16, 1948, by only two shareholders.

All the foregoing are either consolidated with, or enjoined by, the main action, No. 5421—P. H. in the U. S. District Court.

In the U. S. Supreme Court:

(6) *Fahey v. Mallonee*, 332 U. S. 245, 91 L. Ed. 2030 (1947), remanded for trial.

(7) *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041 (1947), Writ of Prohibition, Mandamus and/or Injunction against the U. S. District Judge, denied.

In the U. S. Court of Appeals for the Ninth Circuit:

(8) *Ammann v. Mallonee*, No. 11751, appeal from Order allowing Attorneys' fees to counsel for these appellees, dismissed, February 6, 1948.

(9) *Fahey v. Mallonee*, No. 11867, appeal from Intervention Orders clearing title to homes in Southern California, dismissed April 19, 1948 [R. 3976].

(10) *Fahey v. Mallonee*, No. 12511, this appeal is one of four presently pending before this Honorable Ninth Circuit Court of Appeals. The record on this single appeal comprises twenty-four (24) volumes of over 11,000 printed pages. THIS DOES NOT INCLUDE ALL OF THE RECORD. The clerk's transcript comprises 19,142 pages. Only a small portion of the reporter's transcripts of more than 100 hearings has been printed. Plate A is a photograph of part of the files found by the trial court, in single copies, to weigh in excess of 150 pounds, as of March 1946 [R. 6461].

(11) Petition of *Fahey, et al.*, for leave to file a Petition for a Writ of Prohibition, Mandamus or other appropriate writ, v. U. S. District Judge, denied, June 1, 1950 (no number assigned).

(12) Petition of Federal Home Loan Bank of San Francisco, et al., for leave to file a petition for a Writ of Prohibition, Mandamus or other appropriate writ, v. U. S.

District Judge, denied, June 1, 1950 (no number assigned).

(13) Fahey v. Ronald Walker, Special Master, No. 12575-I, appeal from Order allowing fees to Special Master taken May 5, 1950 (pending).

(14) Fahey v. O'Melveny & Myers, etc., No. 12591, appeal from order allowing attorneys' fees, taken June 20, 1950 (pending).

(15) Fahey v. Ronald Walker, Special Master, No. 12575-II, appeal from Order allowing fees to Special Master, taken November 29, 1950 (pending).

Appellants, at this stage of the proceedings, by this appeal, seek to dismiss and nullify all of the above listed matters. The appellants claim the U. S. District Court for the Southern District of California, where the acts complained of occurred and where all of the properties seized were, and are, located, lacked jurisdiction.

BEFORE THE CONGRESSIONAL INVESTIGATING COMMITTEE.

(16) The Tenth Intermediate Report of the Select Committee to Investigate Executive Agencies, 79th Congress, 2nd Session, Investigation of Federal Home Loan Bank Administration, dated July 25, 1946 (House report No. 2659), recommended (1) the immediate reactivation of the Federal Home Loan Bank of Los Angeles and (2) the restoration of the Long Beach Federal Savings and Loan Association (copy of said Congressional Report is filed concurrently herewith and incorporated herein by reference) [R. 9107-9191].

STATEMENT OF FACTS.

Counsel for this appellee has read the statements of fact as set forth in the brief of the appellants and as set forth in the brief of the appellee, Long Beach Association.

The statements of fact as given by the appellants is inaccurate, incorrect and incomplete in many particulars and, hence, this appellee disagrees with appellants' statement of fact.

The statement of fact contained in the brief of the appellee, Long Beach Association is correct and, in the interest of brevity, is hereby adopted by this appellee as its statement of facts.

Some pertinent facts will be stated here.

On May 27, 1946, this appellee (the plaintiff-shareholders Protective Committee—Mallonee, *et al.*) filed this class action (Mallonee v. Fahey, No. 5421—P. H.) [R. 2] on behalf of the 16,000 shareholders of the Long Beach Association, to recover possession of their solvent Association and approximately \$26,000,000.00 of assets which the appellants had summarily seized on May 20, 1946.

The appellants are accused of a fraudulent conspiracy whereby they twice seized California real and personal property from Californians. On March 29, 1946, the solvent Bank of Los Angeles and its assets of \$45,000,000.00 had been similarly seized.

The "Modus of Operendi" in both seizures was the same, *i. e.*, summary seizure without notice or hearing, by Orders purportedly adopted in Washington, D. C., concurrently with their certification in Los Angeles, California, by the seizing agents who gave no receipts [R. 116].

The seizure of the Long Beach Association in 1946 caused a run of withdrawals of savings of approximately

\$6,000,000.00 in the first six days, and ultimately depleted its savings deposits by approximately \$10,000,000.00.

Plate B, attached, is a photograph of the run of withdrawals of approximately \$6,000,000.00 in the first six days, which occurred on appellants' first seizure of the Long Beach Association, in May of 1946, and ultimately depleted its savings accounts by approximately \$10,000,000.00 [Exhibit 11-7-49-1, R. 8210].

Plate C, attached, is a graphic picturization by chart of the growth of the Association prior to the run, the extent of the run of withdrawals, and the rebuilding of the Association after its founding management was restored in January of 1948 by a final judgment of the U. S. District Court [Ex. 11-7-49-13, R. 8215].

The appellants have confessed judgment *in re* the Long Beach Association seizure [Home Loan Bank Board Order No. 388, January 17, 1948, R. 8231].

The District Court, on January 23, 1948, ordered restoration of all of the assets of the Long Beach Association and a "full and complete accounting" [R. 8310].

The Restoration Order of January 23, 1948, was not appealed and has now become final (App. Br. pp. 34-35).

Some of the assets of the Long Beach Association have been restored, but a "full and complete accounting" satisfactory to the Court, has not yet been made by the appellants [R. 8992].

Prior Administrative hearings set by Board Order No. 5309 [R. 8219] after protest by this appellee, the Shareholders Protective Committee, were abandoned by the appellants on December 6, 1947 [Order No. 169, R. 8231] after the completion by their own examiners of a 350 page "Report of Examination and Audit" of the Long Beach

Federal Savings and Loan Association, as of May 18, 1946, and October 2, 1946 [Ex. Identification Only "C", R. 8217] which reviewed and criticized the transactions of the Association from its organization in 1934 with \$7,500.00 of savings, until it was seized twelve years later from its more than 16,000 shareholders whose savings invested exceeded \$22,000,000.00 and with gross assets in excess of \$26,000,000.00 and surplus, reserves and undivided profits of more than \$1,300,000.00 [R. 361].

The accused appellants, by their Order 2015, seek to again reseize possession of the restored properties of their accusers, the Long Beach Association.

To accomplish this, the accused appellants proposed to hold an Administrative hearing before themselves (The Home Loan Bank Board) to appoint themselves (as the Federal Savings and Loan Insurance Corporation) receivers [Board Order No. 2015, R. 8244] to liquidate their accusers, the Long Beach Association, and to re-seize its assets (including claims against themselves) and to liquidate this litigation without judicial determination or satisfaction of the claims against themselves and their subsidiaries.

The appointment of the Federal Savings and Loan Insurance Corporation "shall be for the purpose of liquidation" (Sec. 148.1 of Part 148, Title 24, Code of Federal Regulations, 1949 edition).

"The members of the Federal Home Loan Bank Board constitute the Board of Trustees of the corporation" (The Federal Savings and Loan Insurance Corporation, a "sue and be sued" corporation) (National Housing Act, Sec. 402(a) 12 U. S. C. 1725; App. Br. p. 133 and 143).

The Preliminary Injunction, the subject of this appeal, was issued by the United States District Court to preserve the "status quo" of the litigation and of the property ordered restored, until appellants can be tried on the merits of the accusations of fraudulent conspiracy made against them in the pleadings.

The Preliminary Injunction appealed from restrains the accused appellants from appointing themselves receivers to liquidate their accusers and this litigation against themselves without a trial on the merits.

PURPOSE OF THIS LITIGATION.

The purpose of this litigation is:

1. To recover possession of the Long Beach Association and all of its assets and restore them to the possession of a management elected by the owners, the shareholder investors, and
2. To remove the conservator, appellant Ammann, and to require an accounting for the assets of the Association and the increments thereof, and
3. To recoup the reasonable value of any assets not recovered, and
4. To remove all clouds and unlawful encumbrances from the title to the property and assets of the Long Beach Association, including the cloud and encumbrance of the \$6,300,000.00 of notes and pledge agreements claimed by the appellant, Bank of San Francisco, to have been executed by the appellant, Ammann, as a pledge of the Long Beach Association's assets, and
5. To quiet title to its assets in said Association and its shareholder members, free from unlawful clouds and encumbrances, and

6. To enjoin and restrain further unlawful interference with the lawful management and control of the Association and its assets, and

7. To require the reactivation of the Bank of Los Angeles and the restoration to it of all of its assets so that the value of the stock and rights of the Long Beach Association in said Bank of Los Angeles will be restored.

8. To have the rights of the defendants, and all of them, and their duties to the plaintiff shareholders of the Long Beach Association adjudicated by a declaratory judgment of the Court, and

9. To recoup for the said Long Beach Association all of the costs and expenses of pursuit, recapture and recovery of said Long Beach Association and its assets (including its reserves, surplus, and undivided profits of more than \$1,300,000.00).

Whenever it appeared that any person, corporation or legal entity claimed any title or right of possession, or control, of said Long Beach Association or any of its properties or assets, they were immediately joined as parties defendant in this litigation in the U. S. District Court at Los Angeles, where the property is located; where the acts of seizure occurred; and where the principal parties reside. This was done so that the U. S. District Court would have full knowledge of all claims and of all claimants to the Long Beach Association and/or its properties and assets. By so doing there has been provided a competent, appropriate, judicial forum in which all parties claiming any title, interest in, right to control or possession of, the said Association of any of its assets, may be heard and their respective claims and interests, if any, adjudicated in one impartial forum at one time.

The 16,000 shareholders of the Long Beach Association, by the institution of this Class action on May 27, 1946, have requested that the U. S. District Court determine whether or not they, the shareholder owners, have the right to have their Association and their savings deposited therein, managed by their duly elected directors and officers, whomever they may be!

The appellants-defendants, Ammann, Fahey and their co-conspirators in an effort to divert the attention of the Courts from themselves and their fraudulent acts, have tried, and are still trying, to confuse the issues by making counter-charges against the repeatedly elected founding directors and officers of said Association under whose management said Long Beach Association developed, in twelve years, from \$7,500.00 initial savings, to more than \$22,000,000.00 in savings invested, and more than \$26,000,000.00 of assets and with surplus, reserves and undivided profits of more than \$1,300,000.00 when it was seized by the appellants-defendants on May 20, 1946.

WHAT HAS BEEN ACCOMPLISHED.

Much has already been accomplished by this litigation.

By the final judgment of the U. S. District Court, made January 23, 1948, following the filing of the Board's confession of judgment (Order No. 388) and by the making of many other partial, but final, judgments and decrees:

1. The appointment of the conservator has been rescinded and the conservator-defendant, Ammann, removed and ordered to account, and

2. The possession of the premises and most of the books and records of the Long Beach Association restored

to the elected directors and officers, who have twice thereafter been unanimously re-elected by the 16,000 shareholders, owners of said Association.

3. A substantial portion, but not all, of the assets of the Long Beach Association have been recovered, and

4. The tangled titles of the Southern California homes of approximately 8,000 borrowers have been cleared and made marketable again.

WHAT REMAINS TO BE DONE.

Much still remains to be done, including among other things:

1. The recovery of the remainder of the assets of the Long Beach Association, including but not limited to, the recovery of:

(a) Stock in the Federal Home Loan Bank of Los Angeles, amounting to approximately \$600,000.00,

(b) U. S. Government Bonds in the amount of approximately \$8,300,000.00 which were being held for safekeeping by the Bank of Los Angeles on March 29, 1946, when it was seized and its assets converted by the Bank of San Francisco and/or Portland, a "sue and be sued" corporation, subsidiary of the "Washington Appellants,"

(c) The, as yet, unaccounted for notes and deeds of trust, or a surcharge for those not returned or satisfactorily accounted for,

(d) The rental from the hotel property owned by the Association when it was seized, and

(e) Excess insurance premiums, conservator's expenses, etc., unlawfully paid by the removed conservator, and

(f) U. S. Government Bonds and cash amounting to approximately \$6,300,000.00 claimed to have been pledged by the conservator to the San Francisco Bank without authority and which are now interplead into the Registry of the U. S. District Court, or such portion thereof as the Court may ultimately determine should equitably be restored to the Long Beach Association,

(g) And many other as yet unaccounted for assets of the Long Beach Association.

2. The completion and settlement, or surcharging, of the accounting of the removed conservator who has not yet made a "full and complete accounting" as ordered by the U. S. District Court, January 23, 1948.

3. The recovery of the reasonable value of assets not returned or accounted for, if any. Upon the final settlement of the accounting of the removed conservator, appellant Ammann, it may be found that many assets have not been returned or accounted for.

4. The making of a final judgment removing any and all clouds and unlawful encumbrances from the title of the Long Beach Federal Savings and Loan Association in, and to, all of its assets.

5. The making of a permanent injunction forever restraining the appellant-defendants, and other parties, from ever unlawfully or improperly interfering with the shareholder owners' right to have their elected directors and officers manage and control all of their property, assets and savings deposited with, or invested in, the Long Beach Association, and

6. The making of a declaratory judgment adjudicating whether the Bank of Los Angeles or the Bank of San

Francisco is the duly qualified and constituted bank for this district of the Home Loan Bank System, and adjudicating in which bank the Long Beach Association and all other similarly situated associations, in this district, now own stock, and

7. The determination of who is properly responsible for and shall pay for the costs and expenses of the pursuit, recapture and recovery of the Long Beach Association and its assets.

It is respectfully submitted that the appellant-defendants, who are accused of fraudulently seizing the assets of these appellee-plaintiffs, are not the proper persons or institutions to hear and determine this litigation against themselves, by Administrative hearing, or otherwise.

PURPOSE OF ORDER NO. 2015.

TO VACATE A FEDERAL COURT FINAL JUDGMENT BY ENJOINED DEFENDANT ADMINISTRATIVE AGENCY HEARING.

The appellant-defendants proposed to again reseize, for the second time, the Long Beach Association and its assets and thus by this second seizure, Order No. 2015, to liquidate this litigation against themselves by appointing themselves receivers to liquidate their accusers, the Long Beach Association, and thereby to indirectly vacate a final Court judgment.

The Federal Savings and Loan Insurance Corporation is the *alter ego* of the Home Loan Bank Board—both are controlled by the Board, *i. e.*, the appellants, Divers, LaRoque and Adams (Reorganization Plan 3 of 1947—12 F. R. 4981—Sec. 2(c), and National Housing Act,

Sec. 402(a)—12 U. S. C. 1721, etc. App. Br. pp. 133 and 143).

Order No. 2015 was issued September 9, 1949 [R. 8242], (a) more than three years after the commencement of this action (No. 5421-P. H.) in the U. S. District Court at Los Angeles, and (b) more than one and one-half years after the Home Loan Bank Board (Order 388) and the U. S. District Court [Judgment of January 23, 1948] had both made their Restoration Orders, rescinding the appointment of the conservator and directing:

(1) That the Long Beach Association and its assets be restored to its elected directors and officers, and

(2) That the removed conservator (appellant Ammann) render a "full and complete" accounting.

The Court, on February 10, 1950, after hearing, found that a "full and complete" accounting satisfactory to the U. S. District Court has not yet been rendered [R. 8992]. Until a "full and complete" accounting is rendered, objections thereto (if any) heard, determined, and settled to the satisfaction of the U. S. District Court, the Long Beach Association and its management do not know the extent of its assets to be recovered from the appellants, nor the extent of the liabilities created by the appellant, Ammann, for which the Long Beach Association is to be held accountable.

The officers of the Long Beach Association cannot certify to the accuracy of the books and records kept by the appellants, Ammann, etc.

As to Ground No. 1 of Order No. 2015, "Failure to File Reports" [R. 8242], the truth, obviously, is as found by the U. S. District Court in its Finding No. 67:

"That the giving of the required monthly report, in the form required by said Board, under the circumstances in dispute in this litigation, including the said form of certification, would, or might, require said Association to prejudice, waive or abandon the litigation of the association's shareholders in the class action herein brought on behalf of said shareholders, without the consent, agreement or knowledge of said shareholders." [R. 8278. Also see Finding No. 66, R. 8277-8278.]

As to Ground No. 2 of Order No. 2015, "Refusal to furnish an affidavit regarding the correctness of the books" [R. 8242], the truth is as found by the U. S. District Court in its Finding No. 69:

"That the President of said Association did make an affidavit as to the correctness of all entries and matters in said books and records of said Association, made or entered by said Association's officers and directors, that said affidavit contained provisos that all such entries were subject to the outcome of the within litigation and said affidavit declined to verify the accuracy of the entries in dispute in this litigation, and made by the defendant, Ammann, as purported conservator." [R. 8279.]

Said affidavit is attached to "Certificate of Examiner" in *re* examination as of July 16, 1949 [Ex. No. 11-7-49, No. 2, R. 8210]. The Examiner in charge, Clifford S. Turner, gave his receipt, acknowledging receipt of this affidavit [Ex. No. 11-7-49, No. 3, R. 8212].

As to Ground No. 3 of Order No. 2015, "Failure to pay insurance premiums in the amount of \$36,487.25," the truth is as found by the U. S. District Court in its Findings No. 48 and No. 49:

[No. 48:]

"Said statement in Order No. 2015 was made after said \$36,487.25 was deposited and now is still on deposit in the Registry of this Court, in interpleader, deposited pursuant to Orders by this Court, for such deposit, after hearing, over the objections of defendant, Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, and the various members and trustees thereof respectively, defendant Ammann, conservator, and his, or their, various deputies or subordinates." [R. 8266.]

[No. 49:]

"That the time for appeal from said Order of this Court for acceptance of deposit into the Registry of this Court in interpleader, of said sum of \$36,487.25, has expired and lapsed, without any appeal therefrom having been taken." [R. 8266.]

As to Ground No. 4 of Order No. 2015, "Unspecified violations," including the items in the "more definite statement" of May 29, 1946, and the general "catch all" of "pursuing a course that was jeopardizing and injurious to the interests of its members, creditors and the public" [R. 8242-8244], the truth is that this Ground, likewise, is without substance or merit—mere generalities.

The appellant, Home Loan Bank Board, when it made restoration Order No. 388, dated January 17, 1948 [R. 8231], had full knowledge of, and had considered all of,

the so-called charges against the elected officers and directors of the Long Beach Association contained in:

- (a) The first seizure Order, No. 5254, dated May 20, 1946 [R. 8229], and
- (b) The so-called "more definite statement" of May 29, 1946 [R. 8218],
- (c) Their own Examiner's exhaustive "Reports of Examination and Audits of the Long Beach Federal Savings and Loan Association as of May 18, 1946, and October 2, 1946, Docket No. 2905" [Ex. C, R. 8217].

This unverified Examiner's report, of approximately 300 pages, reviews, comments upon, and, in some instances criticizes the activities of the Long Beach Association from its inception in 1934 until after its seizure in 1946. All possible criticisms were fully explored and developed. This is the audit report which, though demanded in writing on October 17, 1946 [R. 842] was concealed by appellants from the shareholders of the Long Beach Association for more than three years, until suddenly, at 10:30 P. M. on November 7, 1949, in Court, the appellants attempted to have it introduced into evidence without disclosing it to opposing counsel [R. 8217].

The Home Loan Bank Board, with full and complete knowledge, and after extensive investigation, made its Order of Restoration No. 388, confessing judgment, which has been activated by final judgment of the U. S. District Court of January 23, 1948.

This should be conclusive as to the appellants' unsubstantiated defensive counter-charges made and considered prior to January 17, 1948.

Likewise, the said "more definite statement" and all of the charges therein were submitted to the Committee of the "Smith Committee" of the U. S. Congress, which, after full and extensive hearings, recommended:

"(4) That the Commissioner revoke the Order appointing a conservator for the Federal Savings and Loan Association of Long Beach and restore the assets and affairs of the Association to its duly elected management, and render a proper accounting for the same, as expeditiously as is consistent with judicial determination of the questions at issue." (House Report No. 2659, p. 27, "Tenth Intermediate Report of the Select Committee to Investigate Executive Agencies"—"Investigation of Home Loan Bank Administration"—"Complaints of Federal Home Loan Bank of Los Angeles, Long Beach Federal Savings and Loan Association," 79th Congress, 2nd Session.)

No specific subsequent charges of any kind are made under Ground No. 4, of Order No. 2015. When it was made, on September 9, 1949, the appellant, Home Loan Bank Board also had the recent report of their own Examiner's investigation of the Long Beach Association, made as of July 15, 1949—Docket No. 2905 [R. 8211], which showed no mismanagement. According to said examination report of July 15, 1949, and the testimony of Clifford S. Turner, examiner-in-charge, the management of the Long Beach Association was not even claimed to have committed any violations since restored on January 24, 1948 [R. 10931 to 11001].

As to the final part of Ground No. 4, the indefinite allegation "and have pursued and are pursuing a course

that is jeopardizing and injurious to the interests of its members, creditors and the public," this, likewise, is too indefinite to be worthy of comment.

Since its restoration at least in part, to the management of elected directors and officers, on January 24, 1948, the Association has regained some ground: When seized, on May 20, 1946, the Association had invested savings amounting to more than \$22,000,000.00. When restored, after twenty months of operation by appellant-defendant Ammann, as conservator, the Association had less than \$13,000,000.00 of savings on deposit. Yet, at the present time, it has regained the confidence of the public of the community which it serves to such an extent that it now has savings deposits amounting to approximately \$30,000,000.00. Order No. 2015 does not define just what is "injurious." Is it increasing savings deposits?

The appellants—Home Loan Bank Board—knew when they issued Order No. 2015, on September 9, 1949, that all of the grounds set forth therein were either false, unfounded or had been disposed of by their own prior Order of Restoration, No. 388, made January 17, 1948.

It is obvious that the stated "purposes" or "grounds" as set forth in Board Order No. 2015 are fictitious, false and not the true purpose of said Order.

The true purpose of Order No. 2015 may be inferred from the Order itself which requires the Long Beach Association to "show cause, if any it have, why The Home Loan Bank Board should not . . . enter its Order . . . for . . . the appointment of the Federal Savings and Loan Insurance Corporation, as receiver for said Association." [R. 8244.]

Traditionally, receivers are appointed for the purpose of liquidating institutions and this seems to be borne out by the provision of the Board's own Regulations:

“The appointment of the Federal Savings and Loan Insurance Corporation to be receiver ‘shall be for the purpose of liquidation.’” (Sec. 148.1, Part 148, “Rules and Regulations for the Federal Savings and Loan System with Amendments, to September 30, 1949—Ch. 1(c), Title 24, Code of Federal Regulations.)

The purpose of Order No. 2015 is for these appellants (Divers, Adams and LaRoque) as the Home Loan Bank Board, to preside as judges (Order No. 2015 provides hearings shall be held “before the Home Loan Bank Board. . . .”), at a mock hearing and to appoint the Federal Savings and Loan Insurance Corporation, that is, themselves (Divers, Adams and LaRoque are the sole trustees of the Federal Savings and Loan Insurance Corporation), to be the receiver of the Long Beach Association for the “purpose of liquidation.”

The appellants would thereby “liquidate” this litigation against themselves, the Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, and their subsidiary, the Federal Home Loan Bank of San Francisco and/or Portland and/or Los Angeles (which-ever exists) a “sue and be sued” corporation.

The appellants, by this devious proceeding, could, in effect, reverse the final judgment of the U. S. District Court, which ordered that the Long Beach Association and its assets, be restored to its duly elected directors and officers, and that the Board's representative, the appellant

Ammann, render a “full and complete” accounting, which he has, so far, been unable to do to the satisfaction of the Court.

Order No. 2015 is an order known to be false when made, deliberately made for a fraudulent purpose, to permit the holding of such a mock, so-called “Administrative hearing” would be to aid in the perpetration of a fraud.

PURPOSE OF THESE APPEALS FROM A PRELIMINARY INJUNCTION.

Appellants’ principal purpose in this and the three other presently pending appeals before this Court of Appeals in this same litigation, is to nullify the proceedings in the fifteen (15) previously listed actions and appeals, and to vacate the final Orders and Judgments of the U. S. District Court (1) restoring the Long Beach Association and some of its assets to its owners, the shareholders, (2) requiring appellants to account for its assets, and (3) clearing the titles to thousands of Southern California homes, and (4) many other Orders which have been made during the almost five years of this litigation.

Appellants claim the Courts were at all times without jurisdiction. This claim is made despite the confession of judgment by resolution of the defendants, Home Loan Bank Board, which was required by its terms to be filed with the U. S. District Court [R. 8232]; despite dismissal in 1948, of two prior appeals to this Honorable Court of Appeals, which raised the same questions of jurisdiction; despite denials of Writs of Prohibition, Mandamus, etc., by the U. S. Supreme Court in 1947 and by this Honorable Court of Appeals in 1950, despite the fact that appellants have applied to, and received from, the Court below

affirmative relief, including, among other things, the posting of \$1,000,000.00 bond by appellee, Long Beach Association [R. 3552 and 10333]; and despite the fact that in March, 1949, almost three years ago, appellants complied without appeal with the final Order of the U. S. District Court, and delivered into the Registry of that Court notes, deeds of trust, and U. S. Government Bonds, aggregating approximately \$14,000,000.00.

Their claim of lack of jurisdiction in the U. S. District Court was urged by the appellants before the U. S. Supreme Court in 1947. The U. S. Supreme Court denied these appellants' application for a Writ of Prohibition, etc. (*Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041 (1947)), and remanded the case to the said U. S. District Court for further proceedings. The remand read, in part, as follows:

“And it is further ordered that this cause be, and the same is hereby, remanded to the said District Court for proceedings in conformity with the opinion of this Court.” [R. 2304.]

The U. S. Supreme Court, concurrently, in *Fahey v. Mallonee*, 332 U. S. 245, 91 L. Ed. 2030 (1947), said, in part:

“Nor do we mean to be understood that if supervising authorities maliciously, wantonly, would, without cause, destroy the credit of a financial institution, there are not remedies.” (Pp. 256-257.)

“It is obvious that there is more to this litigation than meets the eye on the pleadings. . . .” (P. 257.)

This language, coupled with the quoted remand, was a direction to the Court below to proceed with the trial on the merits, of the issues of fraud and malice raised by the pleadings.

It is significant that rather than face a trial of these issues, even before their own Administrative hearing, the appellants on December 4, 1947, by their Order No. 139, "continued indefinitely" their Administrative hearing and, on January 17, 1948, adopted Resolution No. 388 [R. 3410] rescinding Order No. 5424 [R. 8229] of appointment of Ammann as conservator. Order No. 388 directed the return of the Association and its assets to the shareholders, from whom they had been seized, and required the appellant, Ammann, "to make a full and complete accounting" for such assets and to file such accounting with the said U. S. District Court. Order No. 388, by its terms required "that a certified copy of this Resolution be forthwith delivered to the above named Court. . . ." [R. 8231.]

Upon the filing of this confession of judgment (Order No. 388), and after hearing, the U. S. District Court, on January 23, 1948, made its Order of Restoration requiring that possession of the Association and its assets, be restored to the elected directors and officers. The Court appointed its Special Master to, among other things, supervise the complicated process of receipting for \$26,000,000.00 in assets, represented in a large part by several thousand notes and deeds of trust, secured by thousands of homes in Southern California, and also represented by millions of dollars of U. S. Government bearer bonds, bank accounts, cash and securities, each and all of which were, likewise, physically situated in Southern California, within the district of the U. S. District Court at Los Angeles, California.

These appellants, by these appeals, now seek the sanction of this Appellate Court to permit them to hold a mock

(Administrative) hearing before themselves, to themselves review and reverse judgments of the U. S. District Court.

The real question is, are final judgments of Federal Courts subject to review and reversal by a defendant Administrative agency?

SPECIFICATION OF ERRORS (App. Br. pp. 22-23) REFUTED.

The sixteen so-called “specifications of error” urged by the appellants, on pages 22 and 23 of their brief, can be summarized as “legalistic smog” designed to irritate, divert, sidetrack and becloud judicial inquiry into the fraudulent conspiracy committed by, participated in, and now being maintained by the appellants, their co-conspirators, subsidiaries, agents and employees.

The appellants’ so-called specification of error all are to the effect that it was error for the trial court to insist on the right of judicial inquiry into their conspiracy, and that the Judge committed error by failing to join with them in their efforts to whitewash such conspiracy without further inquiry or judicial determination.

FINDINGS OF FACT—SUPPORTED.

The “Washington Appellants,” although served (November 19, 1949) [R. 8169] with proposed “Preliminary Injunction with Findings” ten days before it was signed on December 1, 1949, failed to file counter-findings or objections to the 84 Findings of Fact made by the U. S. District Judge, which comprised 82 printed pages and referred to eight exhibits attached thereto [R. 8212-8294]. Yet, the appellants, in their brief, intermittently attack the Findings of Fact as not supported by the evidence. The

appellants, however, nowhere in their brief point out any specific insufficiency of the evidence nor make any argument in support of their claim of lack of evidence.

Attacks upon Findings, unless supported by argument specifically pointing out the error or insufficiency of the evidence need not be considered on appeal. *Wingate v. Bercut*, 146 F. 2d 725 (C. C. A. 9, 1945).

In *Occidental Life v. Thomas*, 107 F. 2d 876 (C. C. A. 9, 1939), the Court cited with approval Rule 52, F. R. C. P., which provides:

“ . . . Findings of Fact shall not be set aside, unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses. . . . ”

A mere reading of this “Preliminary Injunction with Findings” [R. 8194 to 8536, including exhibits] as stated by the Court in *U. S. v. Yellow Cab Co.*, 338 U. S. 338, 94 L. Ed. 150 (1949), indicates that (p. 341):

“The judgment below is supported by an opinion, prepared with obvious care, which itemizes the evidence and shows the reasons for the findings. *To us, it appears that it represents a considered judgment of an able trial judge after patient hearing, but the Government's evidence falls short on its allegations—* a not uncommon form of litigation casualty, from which the Government is no more immune than others. . . . It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an anti-trust case, to come to this court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design.”

In that case, like in the instant case, there was a bulky record, consisting of "1674 closely printed pages."

This appellee, therefore, has not made a detailed analysis of the evidence adduced at the more than 100 hearings in the U. S. District Court and the approximately 20,000 pages of Clerk's Transcript, only approximately 11,000 pages of which have been printed in the 24-volume record on appeal which is exclusive of most of the Reporters' Transcripts of said hearings.

SUMMARY OF ARGUMENT.

The U. S. District Court at Los Angeles had original nationwide jurisdiction, *in rem* or *quasi in rem*, over this action brought by California residents to recover local property or the value thereof, to remove all clouds from their titles, to require an accounting and to recoup the expenses of recovery.

In addition to the inherent jurisdiction of the local court over property within its district there is (a) statutory jurisdiction to quiet title and to remove clouds from local property (28 U. S. C. 1655 (former 118)), and (b) interpleader jurisdiction, both statutory (28 U. S. C. 1335, 1397, 2361 (former 41(26))) and inherent (Rule 22, F. R. C. P.), arising from the numerous interpleaders and interventions filed in the proceedings.

The doctrine of Sovereign's immunity to suit was not here involved as the United States is not a party.

There can be no indispensable parties in an action *in rem* or *quasi in rem* such as this. Only the property is indispensable.

The Court had jurisdiction for judicial review of the administrative orders involved (1) as an incident to the quiet title action, as the orders were the only muniments of color of title submitted by the appellants, (2) under the Administration Procedure Act (5 U. S. C. 1001, etc.), (3) by virtue of the inherent right of courts to judicially review administrative acts impinging upon personal rights.

The jurisdiction of the U. S. District Court at Los Angeles has become the Law of the Case and is *res adjudicata* because:

(a) The U. S. Supreme Court and this Ninth Circuit Court of Appeals have repeatedly denied Writs of Mandamus, Prohibition and/or Injunction and also Supersedeas, although each attacked the Court's jurisdiction.

(b) The U. S. Supreme Court declined to dismiss this action as requested by these appellants (App. Br. S. Ct. p. 101)³ and instead, remanded the action to the U. S. District Court for further proceedings, *i. e.*, for trial on the merits.

(c) Many final, appealable judgments made by the U. S. District Court in the exercise of its jurisdiction have become final, either by appeals dismissed or failure to appeal.

(d) Many final appealable judgments made by the U. S. District Court have been recognized by other courts and

³Refers to Appellants Brief, in the U. S. Supreme Court, No. 687, *Fahey v. Mallonee* (*supra*).

have been accepted and, in part, complied with by these appellants and by all parties, during the approximately five years of this litigation.

(e) Final judgments, though partial, establish the jurisdiction of the Court as the Law of the Case and become *res adjudicata* as to points adjudicated. Jurisdiction, either express or implied, is the essential preliminary foundation of all judgments. There is no right to litigate the same question twice.

The U. S. District Court having jurisdiction over the property in its district has jurisdiction to, and should, issue its Preliminary Injunction to protect its jurisdiction and to preserve the *status quo* pending a trial on the merits. Both generally, and by interpleader, the injunctive protection of jurisdiction is nationwide.

This appellee, plaintiff committee, have no administrative remedies to exhaust, as none were provided for the shareholder owners of the seized Association.

The proposed Administrative hearing Board, being a party defendant, is incapable of impartially trying itself or of rendering appropriate relief, as it would not have jurisdiction of either the *res* (property in California) or of the parties (the California owners and claimants).

A Preliminary Injunction rests in the sound discretion of the trial court and the U. S. District Court did not abuse its discretion in granting a Preliminary Injunction to prevent a recurrence of the \$10,000,000.00 run of 1946 and other irreparable damage, and to preserve the *status quo* until the case can be tried upon the merits.

ARGUMENT.

I. JURISDICTION.

A. IN REM JURISDICTION TO QUIET TITLE AND TO
REMOVE CLOUDS FROM TITLE TO LOCAL PROPERTY
Is Provided by 28 U. S. C. 1655 (Former 118).

This class action was brought under 28 U. S. C. 118 (now 1655) by the appellee-plaintiff (the Shareholders Protective Committee), on behalf of the 16,000 shareholder members of the Long Beach Association, to replevin their Association and its assets and to remove all encumbrances and clouds from the titles to their real and personal property within the territorial jurisdiction of the U. S. District Court at Los Angeles.

The assets of said Association constitute "property." *Omaha National Bank v. Federal Reserve Bank*, 26 F. 2d 884 (1928), decided that certificates of deposit were "property within the purpose and meaning of this Section." Certainly, if certificates of deposit are considered to be property, then actual physical assets owned by the Association and seized by the appellant Ammann, under the direction of his superior, the appellant, Fahey, consisting of money, bonds and notes secured by deeds of trust on California homes and real property, etc., must, necessarily, be considered to be property.

The taking of possession, the dealing with, transferring title to, and otherwise exercising the incidents of ownership over the property of the Association by the appellant and his co-defendant, appellant, Bank of San Francisco and others, certainly constituted encumbering and beclouding the titles to such real and personal property. These shareholder owners were deprived of their rights of

ownership, of their right to have their elected directors and agents handle and deal with their property.

In *Hunter v. U. S. Dept. of Agriculture*, 69 Fed. Supp. 377 (1946), it was held that the local U. S. District Court there had jurisdiction on behalf of occupants of a resettlement project in Texas to compel the Secretary of Agriculture to deliver title to minerals underlying their property and to remove the cloud to the titles to their lands. The test of a cloud upon the title to property is the practical effect the claim, even if unfounded, has on title or value or lessens the chance of free sale. *Carney v. Commonwealth Oil and Gas Co.*, 5 Fed. Supp. 304 (1933).

The defendant-appellant's, Ammann's unauthorized seizure of possession, dealing with, and conveying of title to the assets of the Association, whether outright or by way of pledge, certainly affected the title to such assets and undoubtedly lessened the chance of a free sale of such assets by their true owners, these shareholders.

The Citizens Savings, etc., Co. v. Illinois Central R. R. Co., 205 U. S. 46, 51 L. Ed. 703, 27 S. Ct. 425 (1907), like the instant case, was a class action brought by the stockholders to cancel certain deeds, leases and transactions. The trial court dismissed, but the U. S. Supreme Court held it to be a suit to remove clouds from the titles to the property of the stockholders of the railroad, reversed the dismissal and remanded the action to the trial court for further proceedings, as was, likewise, done in the instant litigation (*Fahey v. Mallonee*, 332 U. S. 245, 91 L. Ed. 2030 (1947)).

Commonwealth Trust Co. v. Reconstruction Finance Corp., 28 Fed. Supp. 586 (1939), was an action seeking to recover pigiron located within the District Court's

territorial jurisdiction, held by a local agent of the non-resident Reconstruction Finance Corporation. The Court stated:

(Page 587):

“We shall first consider the objection made to the jurisdiction of this court. Defendant, contends that as a corporation under the laws of the U. S. all of whose capital is owned by the U. S., and whose principal office is located in the District of Columbia, it is not suable in this district. These facts appear in a statute creating this corporation. Section 15 U. S. C. A. Sections 601 and 602.”

(Page 588):

“The property involved in this law suit is located in this district. It is in the possession of the defendant through its authorized agent. The plaintiff claims he is entitled to this property. We therefore hold the defendant is sueable in this district in an action to recover it. If we find the plaintiff is entitled to it, we may then apply the proper remedy as authorized by the new Federal Rules of Civil Procedure. . . .”

“It also sets forth the claim of title, which the defendant asserts, and avers it is fraudulent and void as against the plaintiff.”

“Assuming all this is true, the complaint presents a claim on which relief may be granted”

The home offices of both the Banks of Los Angeles and San Francisco are within California; the stock in said banks is within California; the original, fraudulent, so-called dissolution, of the Los Angeles Bank occurred within California; the unauthorized transfer of the stock

of the Bank of Los Angeles to the Bank of San Francisco occurred in California, if at all.

The only part of the entire alleged conspiracy which is not in California is that the “master minds” the “Washington Appellants” who directed the alleged conspiracy, have attempted to evade the Court’s jurisdiction, by remaining out of California. The absence from California of some of the alleged conspirators does not deprive the U. S. District Court of its jurisdiction over California properties and the California conspirators.

Jellenik v. Huron River Mining Co., 177 U. S. 1, 44 L. Ed. 647 (1900), was an action by stockholders of a Michigan corporation in Michigan to recover their stock allegedly fraudulently sold under assessment by non-resident defendant officers to non-resident defendants who bid in the stock in Boston, Massachusetts. The District Court dismissed the action on the ground that the non-resident defendant sellers and purchasers of the stock were indispensable parties.

In reversing, the U. S. Supreme Court stated:

(Page 13):

“But the bill does show that the property represented by the certificates of shares is held by a Michigan corporation, which being subject personally to the jurisdiction of the Court, may be required by a final decree in a suit brought under the act of March 3, 1875, to cancel such certificates held by persons outside of the state and regard the plaintiffs as the real owners of the property interest represented by them. . . . The corporation being brought into court by personal service of process in Michigan and a copy of the order of court being served upon

the defendants charged with wrongfully holding certificates of the stock in question, every interest involved in the issue as to the real ownership of the stock will be represented before the court. We think the Circuit Court may rightfully proceed under the Act of 1875, for the purpose of determining such ownership, and that in dismissing the bill error was committed."

In *Harvey v. Harvey*, 290 Fed. 653 (1923), the action was brought in the U. S. District Court in Wisconsin to recover stock in a Wisconsin corporation, although the certificates of stock were in the possession of non-resident defendants. And, as here, a Preliminary Injunction was issued restraining non-resident defendants who there, as here, were objecting to the jurisdiction of the Court.

In affirming the Preliminary Injunction, the Court states:

(Page 659):

"Appellant's contention that the injunction granted relief *in personam* and therefore cannot be based upon service under Section 57 (Sec. 118, Title 28) which applies to actions *in rem* is not well founded. This suit is in the nature of a suit to quiet title to personal property within the jurisdiction of the court. The court has in its custody the *res*. It puts out its protecting hand and says to the defendants that the plaintiff claims the *res*; that pending the determination of that claim the *status quo* shall be maintained and the defendants restrained from using the *res*; that if they desire to contest the claim of the plaintiff to this property they shall come into court and do so. . . . These cases are appeals from the order granting a temporary injunction and the order refus-

ing to vacate or dissolve the same. *The merits of the controversy between the parties are not before the court, except insofar as necessary to determine whether the plaintiff by his bill and affidavits has made out a case sufficient to sustain the temporary injunction. . . .*" (Emphasis added.)

Likewise, in *Thompson v. Emmett Irr. District*, 227 Fed. 560 (C. C. A. 9, 1915), which was a class action brought by bond holders to remove clouds (outstanding spurious stock) from title to the properties of the corporation, the trial court's dismissal was reversed on the ground that the action was properly brought within 28 U. S. C. 118 (now 1655).

Wherever possible, non-resident defendants have been served within the confines of the State of California. Those defendants who have evaded service by remaining outside of California have been served pursuant to Order of Court for service upon absent defendants by the U. S. Marshal in the respective districts where they could be located. Appellant Fahey was served in Washington, D. C. [R. 66].

Throughout the entire litigation the "Washington Appellants," the Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, Commissioner and Trustee John H. Fahey, Board members and Trustees Divers, Adams and LaRoque, and their predecessors, have at all times been represented by counsel, both special counsel from Washington, D. C., such as Judge Ray Dougherty, William McKenna, Donald MacGuinaes, Melvin Seigel, Mose Silverman and numerous others, and at all times they also have been represented by members of the staff of the U. S. Attorney's office at Los Angeles, such as

Ronald Walker (now Special Master), James Carter (now U. S. District Judge), Arline Martin, Paul Fitting and others.

The "Washington Appellants" have appeared generally on many occasions through their counsel without reservation. For example, on April 7, 1947, the Court made its Order:

"On Motion of Attorney Walker it is ordered that Ray E. Dougherty, Esq., be admitted and associated as counsel for defendants herein, namely, A. V. Ammann, individually and as conservator, and John H. Fahey, individually and as commissioner."

"Attorney Dougherty argues in opposition to Motions for Attorneys' fees" without reservation.

The "Washington Appellants" have appeared generally by their consent to judgment of restoration. Resolution No. 388, rescinding the appointment of Ammann as conservator, directing that he render a "full and complete accounting" and that a copy be filed in the U. S. District Court at Los Angeles, as was done, was a confession of judgment. The U. S. District Court, after hearing thereon, made its order directing the restoration of said Association to its elected directors and officers. As no appeal was taken from this judgment, it has become final. It has been relied upon and acted upon by all parties, including the "Washington Appellants" and their subsidiary, the Federal Home Loan Bank Board of San Francisco.

The appellants' plea of "lack of jurisdiction" over the "Washington Appellants" is, of course, purely a technical, dilatory plea, as they have been furnished with all of the pleadings, affidavits and processes had and done in the

entire litigation and have at all times been kept apprised of the progress of the litigation, and have at all times, as they have deemed advisable, participated in the proceedings had and done in the past nearly five years of this litigation.

The Court has personal jurisdiction over the "California Appellants" by virtue of their having been served within the State of California. It has jurisdiction over the "Washington Appellants" both by virtue of their having been served by Order of Court as non-resident defendants, pursuant to 28 U. S. C. 118 and by their appearance, through counsel, at various times without reservation, as well as by their having sought affirmative relief such as their submission, to jurisdiction by this appeal and prior appeals.

It, therefore, appears that the U. S. District Court has jurisdiction of the subject matter and of the parties under 28 U. S. C. 1655 (former 118).

B. INTERPLEADER JURISDICTION.

The U. S. District Court also has interpleader jurisdiction by virtue of (1) Interpleader Statutes, 28 U. S. C. 1335, 1397 and 2361 (former 41(26)), and (2) by Rule 22 of F. R. C. P., and (3) the inherent interpleader jurisdiction of courts.

Many interpleaders, and bills in the nature of interpleader, have been filed in this litigation. A verified cross-claim in interpleader was filed by the Title Service Company on June 4, 1946 [R. 43], and 174 notes, deeds of trust, etc., were deposited with the Clerk of the Court [R. 57]. Subsequently, Home Investment Company, by appropriate Court Order, was authorized to, and did, on

July 20, 1946 [R. 8288], pay off these notes by depositing \$776,832.24 in lieu thereof in the Registry of the Court [R. 405]. A \$50,000.00 certified check claimed by both the appellants, Ammann and Fahey (non-residents), and by the appellee, Attorney Robert H. Wallis (a California resident), was interplead [R. 86], and deposited in the Registry of the U. S. District Court at Los Angeles [R. 92] on June 12, 1946, where it still remains awaiting disposition by the Court. George Turner, on January 29, 1948, interplead \$11,515.87 in rentals which had accrued under the terms of a lease on hotel premises owned by the Association, which the appellant, Ammann, had endeavored to cancel [R. 3461, etc.] and subsequently has interplead additional money, as rent accrues.

The Long Beach Association caused to be interplead into the Registry of the Court collateral securities in excess of \$6,300,000.00 claimed by both the Bank of San Francisco and the Bank of Los Angeles, on notes executed by the appellant, Ammann, on which liability is denied by the Long Beach Association and, pursuant to Order of Court [R. 8399] filed March 13, 1948 [R. 3772, 3775-3780, etc.], there was interplead into the Registry of the Court said notes and collateral securities amounting to several millions of dollars.

Insurance premiums claimed by the non-resident Federal Savings and Loan Insurance Corporation, a "sue and be sued" corporation doing business in California, the amount of which premiums is denied by these plaintiffs, appellees, have been interplead by the Long Beach Association at various times into the Registry of the U. S. District Court, and as of February 1, 1951, now amounts to in excess of \$55,487.25.

These various interplead sums and assets remain on deposit in the Registry of the U. S. District Court at Los Angeles pending further Order of the Court.

In the interpleader statutes, 28 U. S. C. 2361 (former 41(26)), as well as in the Quiet Title Statutes (28 U. S. C. 1655, former 118), provision is made for service of process "by the U. S. Marshal for the respective districts where the claimants reside or may be found." The "Washington Appellants" were served with the various complaints and cross-complaints in interpleader pursuant to appropriate Order of Court, by U. S. Marshals wherever they could be found [R. 82, 795, etc.].

Ry. Express Agency Inc. v. Jones, 106 F. 2d 341 (1939), was a class action instituted by Jones on behalf of the class of citizens of various states who had been victims of the Sir Francis Drake Estate solicitation. The proceeds of the fraud were in the possession of the defendant express agency who, as an affirmative defense, filed a bill in the nature of an interpleader as the funds were also claimed by the Collector of Internal Revenue for non-payment of income tax by the perpetrators of the fraud.

In reversing the trial court's denial of interpleader, the Court stated:

(Page 344):

"Where the possessor of funds can establish the essential and jurisdictional facts prescribed in the statute, his right to relief under this section (41-26) is absolute."

(Page 345):

“By proceeding under the counter-claim of the railway *express the jurisdiction of the court was unassailable* and the claims of all claimants may be liquidated exactly the same as in a proper class suit.”

“It, therefore, follows that as a matter of wise discretion, as well as of recognizing a right which the railway express possessed absolutely, the court should, after the counter-claim was filed, have proceeded as provided for in the interpleader statute.”

A bill in the nature of interpleader is sufficient to vest jurisdiction. *Texas v. Florida*, 306 U. S. 398, 83 L. Ed. 817 (1939); *Hunter v. Federal Life Ins. Co.*, 111 F. 2d 551 (1940). A defense was raised of no proper interpleader, but the Court stated:

(Page 555):

“It would serve no useful purpose to discuss the sufficiency of the averments of the bill as a strict bill of interpleader, since it was clearly sufficient as a bill in the nature of interpleader, which may be maintained by one who is not a mere stakeholder.”
(Citing Cases.)

It is not necessary that all of the claimants even have a valid claim to the property which is the subject matter of the interpleader or of the bill in the nature of interpleader.

In *Harris v. Traveler's Insurance Co.*, 40 Fed. Supp 154 (1941), in denying a motion to dismiss for lack of conflicting claims, the Court stated:

(Page 157):

“It thus becomes clear that the jurisdiction of this court to entertain an interpleader bill does not depend

on the validity or even bona fides of the claims of the respective defendants. It is obvious that in almost any case the claim of one of the parties will ultimately be determined to be invalid, that, however, it is a matter for determination at the trial and cannot affect the jurisdiction of the court.”

In *Hunter v. Federal Life Insurance Co.*, 111 F. 2d 551 (1940), the Court states:

(Page 556):

“The jurisdiction of a Federal court to entertain a bill of interpleader is not dependent upon the merits of the claims of the defendants.”

In *Mallors v. Equitable Life*, 87 F. 2d 233 (1936), the contention that lack of diversity of citizenship prevented interpleader jurisdiction was denied. The Court, in affirming, stated:

(Page 235):

“The institution of this *interpleader* suit by the insurance company *has made the Federal District Court the forum wherein the controversies must be determined . . .*” (Emphasis added.)

Removal of appellant Ammann, as conservator, could have no effect on the interpleader jurisdiction of the U. S. District Court or otherwise, because as stated in *Mallors v. Equitable Life* (*supra*):

(Page 235):

“Subsequent disposition of some of the issues by the court before judgment cannot oust the Federal Court of jurisdiction any more than a change of residence of one or more of the parties after suit is begun in the Federal Court may accomplish such a result. . . .”

Interpleader jurisdiction is not dependent upon diversity of citizenship between the claimants. In *Security Bank v. Walsh*, 91 F. 2d 481 (C. C. A. 9, 1937), all claimants were citizens of California, yet the Court of Appeals reversed the trial court for denying interpleader and remanded the case for further proceedings.

In *Hunter v. Federal Life Ins. Co.* (*supra*), all claimants were citizens of Arkansas. In *Mallors v. Equitable Life* (*supra*), all claimants were citizens of Illinois. In *Maryland Casualty Co. v. Glassell-Taylor*, 156 F. 2d 519 (1946); *Tricnics v. Sunshine Mining Co.*, 308 U. S. 66, 84 L. Ed. 85 (1940); *Railway Express Co. v. Jones*, 106 F. 2d 341 (1939); *Pure Oil Co. v. Ross*, 170 F. 2d 651 (1948) and *U. S. v. Sentinel Insurance*, 178 F. 2d 217 (1949), the claimants were citizens of various states.

In *Rossetti v. Hill*, 162 F. 2d 892 (C. C. A. 9, 1947), this Court stated:

(Page 892):

“It seems clear that the reason for interpleader is not negatived by the fact that the claimants to the fund all reside in the same state. The *usefulness* of the proceeding is in the protection of the party against conflicting claims . . . *The controversy is settled by the sensible process of bringing all parties into one court proceeding.* . . .” (Emphasis added.)

Interpleader jurisdiction of a District Court having once been properly assumed it is absolute and its jurisdiction is exclusive and nation-wide, *Railway Express Agency Inc. v. Jones* (*supra*); *Cramer v. Phoenix Mutual Life Insurance Co.*, 91 F. 2d 141 (1937), Certiorari denied: 302 U. S. 649, 28 U. S. C. 2361 (former Sec. 41(26)).

In *Publicity, etc. v. Collector of Internal Revenue*, 139 F. 2d 583 (1943), the court said:

(Page 587):

“We consider it important that the usefulness of the statutory remedy of interpleader which has been greatly liberalized by the interpleader act of 1936 and by Rule 22 of the F. R. C. P. shall not be impaired by narrow and restrictive rulings.” (Emphasis added.)

In addition to its jurisdiction under the original complaint (28 U. S. C. 1655, former 118) upon the filing of the first cross-claim-in-interpleader, ITS JURISDICTION IN INTERPLEADER BECAME “UNASSAILABLE” AND THE U. S. DISTRICT COURT AT LOS ANGELES BECAME THE “FORUM WHEREIN THE CONTROVERSIES MUST BE DETERMINED.”

C. SOVEREIGN’S IMMUNITY TO SUIT IS NOT HERE INVOLVED.

The doctrine of sovereign immunity to suit is not here involved, as the United States has not been made a party to this litigation.

Citizens may sue officers of the United States to recover their property wrongfully detained by such officers without thereby suing the sovereign or infringing upon the sovereign’s immunity from unconsented suit. This doctrine is particularly applicable when the transactions are tinged with fraud, as is here alleged.

U. S. v. Lee, 106 U. S. 196, 27 L. Ed. 171 (1882), was an action in ejectment to recover possession of a tract of land from defendants who, acting under orders of the President, had taken possession under a tax deed to the

Uniter States, and converted part into a fort and part into a cemetery. The assertion by the defendant officers that they had acted for the United States did not foreclose judicial inquiry. Judgment was for plaintiff ejecting the defendant officers.

In *Land v. Dollar*, 330 U. S. 731, 91 L. Ed. 1209 (1947), plaintiff sued the members of the U. S. Maritime Commission to recover pledged Dollar Steamship Co. stock, claiming the debt had been paid. The defendants claimed title on behalf of the United States. The Maritime Commission members there, like the members of the Home Loan Bank Board and trustees of the Federal Savings and Loan Insurance Corporation are doing here, claimed that they were Government officials, immune from suit regardless of the merits of their defense.

The U. S. Supreme Court, in holding that the action be tried on the merits, said:

(Page 737):

“Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *U. S. v. Lee*, 106 U. S. 196; 27 L. Ed. 171, 1 Sup. Ct. 240, *supra*, has been repeatedly approved (Citing a long list of cases) . . .”

(Page 738):

“The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.”
“It is in the latter category that the pleading here casts this case.”

Retrial resulted in judgment for the defendant officials, but the appellate court directed judgment for the plaintiffs, stating:

“Any other conclusion, if the transaction were between private parties, would be wholly untenable in our opinion. We do not see why the transaction should have a different essential nature merely because a Government agency was a party.”

“The judgment of the District Court is reversed and the case remanded for entry of judgment in accordance with this opinion.” *Dollar v. Land* (No. 10299), (C. C. A., D. C., July 17, 1950, 78 Wash. L. Rep. 1336).

Where suit is for recovery of property wrongfully held by Government agents, the United States is not a necessary party and property is recoverable from *any* agency withholding possession wrongfully. *Sawyer v. Dollar* (No. 10876, January 31, 1951, C. C. A., D. C.) Petition by Secretary of Commerce to U. S. Supreme Court is pending.

D. NO INDISPENSIBLE PARTIES—IN REM.

There can be no indispensable parties to an action *in rem* involving possession and title to real and personal property situated within the territorial jurisdiction of the U. S. District Court.

The non-resident “Washington Appellants” cannot deprive the local U. S. District Court of jurisdiction over property within its territorial jurisdiction by claiming immunity for the frauds committed pursuant to the direction, within the Court’s jurisdiction.

The seizure of the solvent Los Angeles Bank on March 29, 1946, with its \$46,000,000.00 of assets, including \$1,900,000.00 of reserves, surplus and undivided profits and the seizure of the solvent Long Beach Association, on May 20, 1946, with its \$26,000,000.00 of assets, including \$1,300,000.00 of reserves, surplus and undivided profits, all occurred within the territorial jurisdiction of the U. S. District Court at Los Angeles. All of the property sought to be recovered in these proceedings is yet physically within the jurisdiction of the U. S. District Court, The Restoration Order of the U. S. District Court, made January 23, 1948, removing the conservator and ordering the restoration of all of the property of the Long Beach Association and directing that a "full and complete" accounting therefor be made, was directed to, and expended itself upon, the properties within California and persons who have been served within the jurisdiction of the U. S. District Court, that is, upon defendants Ammann, Bramley, the Federal Home Loan Bank of San Francisco and/or Portland, the Home Insurance Company, bondsmen for the appellant, Ammann, *et ux*.

Similarly judgments, (1) declaring Orders No. 5082-3-4 and 5254 unlawfully issued and void, (2) reactivating the Los Angeles Bank, (3) restoring their respective assets to the Los Angeles Bank and to the Long Beach Association, (4) quieting title thereto, (5) requiring the San Francisco Bank and Ammann to respectively account therefor, (6) surcharging their accounts, if need be, (7) and requiring repayment of deficiencies by their respective bondsmen and indemnitors (*i. e.*, the defendants, Home Insurance Company and Federal Savings and Loan Insurance Corporation, both "sue and be sued" corporations, doing business in California) are all judgments which ex-

pend themselves upon properties within California and are directed to persons in, and corporations doing business in, California.

Colorado v. Toll, 268 U. S. 228, 69 L. Ed. 927 (1925), held the Secretary of the Interior was not an indispensable party in an action to set aside his regulations as to speed limits in a National Park located in the State of Colorado. The U. S. Supreme Court reversed the U. S. District Court for dismissing the action for lack of the so called indispensable Secretary of the Interior.

The U. S. Supreme Court suggested that the Secretary of the Interior would have been a desirable party, but that he was neither a necessary nor an indispensable party. In this litigation, the Home Loan Bank Board, The Federal Savings and Loan Insurance Corporation, Divers, Adams and LaRoque, members and trustees thereof, Fahey, former Commissioner and sole trustee, and others, are desirable parties to this action, and, therefore, have been served with summons and pleadings, pursuant to appropriate Court orders, inviting them to come into the local U. S. District Court and assert their claims, if any they cared to make.

But, this invitation does not thereby make them either necessary or indispensable parties.

The U. S. District Court at all times has been open to the appellants, and all of them, to present any claims, charges or counter-charges they might care to make, but the "Washington Appellants" have not availed themselves of this opportunity to have the matter tried on the merits [Finding 47, R. 8263-5].

In *Williams v. Fanning*, 332 U. S. 490, 92 L. Ed. 95 (1947), the Postmaster General, after a hearing held in

Washington, D. C., ordered the Postmaster at Los Angeles to stamp "fraudulent" on money orders sent the plaintiff, and to return them.

(Page 492):

"Petitioners thereupon brought this suit in the District Court for the Southern District of California, to enjoin respondent from carrying out the order, claiming that they had been deprived of the hearing to which they were entitled and that the fraud order was without the support of substantial evidence. On Motion of the respondent, the District Court dismissed the complaint holding in accord with the view of the Ninth Circuit Court of Appeals, that the Postmaster General was an indispensable party. The Circuit Court of appeals affirmed . . . 158 F. (2d) 95."

The U. S. Supreme Court, in reversing and remanding for trial, said

(Page 494):

"The decree in order to be effective, need not require the Postmaster General to do a single thing—he need not be required to take new action, either directly, as in the Smith and Fall Cases, or indirectly through his subordinates, as in the Ritter case. No concurrence on his part is necessary to make lawful payment of the money orders and release of the mail, unstamped. Yet that is all the Court is asked to command. Reversed."

Judge Hall, in granting this preliminary injunction and refusing to dismiss the action, acted in obedience to the rulings of the U. S. Supreme Court, not only in *Williams v. Fanning* (*supra*), but also in compliance with the remand in this case of *Mallonee v. Fahey* (*supra*).

Clearly, if the U. S. District Court has jurisdiction to order payment of money orders and delivery of mail by the local Postmaster, contrary to the express orders of the Postmaster General in Washington, D. C.,—3000 miles away—the same U. S. District Court has jurisdiction over the approximately \$14,000,000.00 in its own Registry.

Hynes v. Grimes Packing Co., 337 U. S. 86, 93 L. Ed. 1231 (1949), held the Secretary of the Interior was not an indispensable party in an action to enjoin enforcement of his order which, in effect, deprived the plaintiffs of the right to catch salmon in certain waters in Alaska.

In affirming the decision of this 9th Circuit Court of Appeals the State Supreme Court said:

(Page 96):

“(a) At the outset, the United States contends that the Secretary of the Interior is an indispensable party who must be joined as a party defendant in order to give the District Court jurisdiction of this suit. In *Williams v. Fanning*, 332 U. S. 490, 92 L. Ed. 95, 68 S. Ct. 188, the test of whether a superior official can be dispensed with as a party was stated to be whether the ‘decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court’, P. 494. Such is the precise situation here. Nothing is required of the Secretary; he does not have to perform any acts, either directly or indirectly. Respondents merely seek an injunction restraining petitioner from interfering with their fishing.”

In this appeal these appellees seek only that thus Preliminary Injunction be upheld to restrain the appellants

from interfering with the U. S. District Court's trial of the issues on the merits.

In *Hynes v. Grimes Packing Co.* (*supra*) the Court stated:

(Page 126):

"These are questions of public policy which equity is alert to protect. This court is far removed from the locality and cannot have the understanding of the practical difficulties involved in the conflicts of interest that is possessed by the district court. . . ."

(Page 127):

"Unless steps are taken in this proceeding, the District Court, on the expiration of thirty days, shall enter a decree enjoining the defendant, Hynes, and all acting in concert with him substantially as ordered in permanent injunction entered November 6, 1946. . . ."

(Page 127):

"Pending the entering of further orders by the District Court, the preliminary injunction entered July 18, 1946 shall apply to protect the rights of the respondents." (Emphasis added.)

In *Varney v. Warehime*, 147 F. 2d 238 (1945), certiorari denied 325 U. S. 882, the Court points out:

(Page 242):

"Matters of convenience and necessity are entitled to consideration. Citizens should not be compelled to seek a distant forum for litigation of their controversies with the Government and, likewise, public officials should not be compelled to neglect their duties

to answer charges of usurpation of power in a distant forum.”

“The right of intervention is available to a superior official in any suit where his subordinant is made a party defendant. Governmental regulations under present circumstances are so wide spread and affect such a vast number of our people that those who in good faith believe a public official is proceeding beyond his jurisdiction should be permitted to litigate the question, if the officer before the court is such an agent in the matter involved that it is reasonable to proceed to an adjudication of the issues with finality.”

The “Washington Appellants,” defendants, seek to hold a hearing before themselves, in Washington, D. C., to appoint themselves receivers of the California property of these shareholders and to thereby liquidate this litigation against themselves and their subsidiary, the San Francisco Bank.

The California owners (these 16,000 shareholder members of the Long Beach Association) would have to travel 3,000 miles to Washington, D. C., to seek to intervene in a hearing involving their property. Whether they would be permitted to intervene would be dependent upon the whim of the accused appellants, the Home Loan Bank Board, presiding at such a mock trial.

The language in *Varney v. Warchime* (*supra*) and of the U. S. Supreme Court in *Hynes v. Grimes Packing Co.*, 337 U. S. 86 at 126, 93 L. Ed. 1231 (1949), is particularly applicable to this litigation which involves the titles to the Southern California homes of some 8,000 borrowers. U. S. District Judge Hall has now become familiar with this complex litigation as the result of more than 100 hear-

ings requiring his consideration during nearly five years. Numerous other cases come to the same conclusion, that such distant superior public officials are not indispensable parties to actions *quasi in rem* adjudicating matters of local import such as the instant litigation.

In *Jaeger v. Simrany*, 180 F. 2d 650 (C. C. A. 9, 1950), the Immigration Commissioner was not indispensable to enjoin an Administrative hearing to cancel a certificate of lawful entry of an alien.

The local U. S. District Court cannot be deprived of its jurisdiction over property within its district merely by the fact that the "master minds" who directed the fraudulent conspiracy to seize such local property have evaded the jurisdiction of the Court by remaining outside its territorial boundaries.

The long arm of equity in "in rem" and "interpleader" actions cannot be so fraudulently foreshortened.

E. JURISDICTION FOR JUDICIAL REVIEW OF ADMINISTRATIVE ORDERS.

The U. S. District Court has jurisdiction to judicially review Administrative Agency Acts and Orders, including, among others, the four seizure Orders, Nos. 5082-3-4, and 5254, and the Restoration Order No. 388. These were all five final, judicially reviewable Administrative Orders. Federal Home Loan Bank Administration seizure Orders, Nos. 5082-3-4 of March 29, 1946, and No. 5254 of May 20, 1946, were judicially reviewable upon three grounds:

First: As an incident of the Quiet Title action to determine the validity of the appellants' claim of color of

title as a defense to justify their having exercised the incidents of ownership over California property of the plaintiffs.

Second: Under the Administrative Procedure Act (5 U. S. C. 1009, etc.) which specifically provides for judicial review of acts of Administrative agencies, such as these.

Third: The inherent power of courts to judicially review Administrative Orders which violate personal rights.

1. This action to replevin and quiet title to property in California gives the U. S. District Court jurisdiction. The appellants submitted, as their sole muniments of color of title to the California property over which they exercised the incidents of ownership, said Orders Nos. 5082-3-4 and 5254. The validity of said Orders is thereby drawn into issue, and they thus become subject to judicial review as an incident to the determination of title to California property, the *res* in this litigation.

The appellants have thereby submitted to the jurisdiction of the U. S. District Court at Los Angeles.

The appellants, Bank of San Francisco, Ammann, Bramley and others, have exercised the incidents of ownership over the assets and properties admittedly owned by the Bank of Los Angeles prior to March 29, 1946, and those admittedly owned by the Long Beach Association prior to May 20, 1946. They have held possession, sold, conveyed, transferred, pledged, released, used, driven, spent and generally dealt with, as an owner would, the cash, bonds, stocks, notes, collateral, trust deeds, securities, furniture, automobiles, equipment and real and personal property of the Bank of Los Angeles and the Long Beach Association, respectively.

The only muniments of even color of title or possible conveyances to these appellants of the incidents of ownership exercised by them over these California properties, are contained, if at all, in the said four seizure Orders of the Federal Home Loan, Bank Administration. The three Orders dated March 29, 1946 (Nos. 5082-3-4) are the only possible basis of, or appellants claim to, the right of possession, use or title of the properties admittedly then owned by the Bank of Los Angeles. The Order dated May 20, 1946 (No. 5254) is, likewise, the only possible basis of appellants' claim to the right of possession, use or title, or right to exercise any of the incidents of ownership over the property admittedly then owned by the Long Beach Association.

They purport to be final conveyances and the appellants treated them as final conveyances. They immediately forthwith used and exercised the various incidents of ownership. They sold bonds, conveyed securities, assigned notes and trust deeds, paid over monies (\$7,300,000.00 of the Bank of Los Angeles' money paid by the Bank of San Francisco to Ammann), pledged, and accepted the pledge of notes and trust deeds (\$12,000,000.00 of notes and trust deeds of the Long Beach Association assigned by Ammann and admittedly accepted as pledge by Bank of San Francisco).

2. THE ADMINISTRATIVE PROCEDURE ACT (Section 10) PROVIDES FOR JUDICIAL REVIEW OF FINAL ACTS OF ADMINISTRATIVE AGENCIES (5 U. S. C. 1009). Federal Home Loan Bank Administrative Orders Nos. 5082-3-4 and 5254 were final Agency Orders and were treated and acted upon as final by all of the appellants.

These were not "preliminary, procedural or intermediate Agency" acts or rulings. The Federal Home Loan

Bank Administration did not provide by Rule or otherwise that these Orders, or any of them, were to be inoperative pending an appeal to any superior agency, authority or Court. No such appeal was, or is, provided. Said four seizure Orders were self-executing Orders representing “final Agency action for which there is no other adequate remedy in any court” other than the U. S. District Court at Los Angeles.

The Administrative Procedure Act (5 U. S. C. 1009) specifically provides (Sec. 10):

“(c) Reviewable Acts: Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, AGENCY ACTION OTHERWISE FINAL SHALL BE FINAL FOR THE PURPOSES OF THIS SUBSECTION WHETHER OR NOT THERE HAS BEEN PRESENTED OR DETERMINED ANY APPLICATION FOR DECLARATORY ORDER, FOR ANY FORM OF RECONSIDERATION, OR (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) FOR AN APPEAL TO SUPERIOR AGENCY AUTHORITY.”

Orders Nos. 5082-3-4 and No. 5424 were judicially reviewable final agency acts, within the purview of Section 10(c) of the Administrative Procedure Act (5 U. S. C. 1009c). All Administrative remedies of this appellee-plaintiff have been exhausted as to these Orders. No Administration remedy was afforded the Shareholders of

the Long Beach Association or the Stockholders of the Bank of Los Angeles.

These Shareholders, deprived by said four Orders of their right of possession and of their right to exercise the incidents of ownership over their own California properties, suffered legal wrong, and have been adversely affected by final agency action. The Bank of Los Angeles, in which the class of Shareholders represented by this appellee, were stockholders, was also arbitrarily, capriciously and fraudulently purportedly dissolved without notice, hearing or cause and without the consent of its voting stockholders.

The Administrative Procedure Act (5 U. S. C. 1009a) specifically provides (Sec. 10):

“(a) Right to review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

The plaintiffs are persons entitled to judicial review of said four final Orders.

These actions are for declaratory relief, replevin and to quiet title to properties all located in California [R. 2960]. The acts of seizure occurred in Southern California, the owners from whom the properties were seized are residents of California, the persons (Bank of San Francisco, etc.) in whose possession the property now is are all in California.

These actions are local in character and *in rem* in nature.

The Administrative Procedure Act (5 U. S. C. 1009) provides (Sec. 10):

“(b) Form and Venue of Action: The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction.”

In *United States v. State of Idaho*, 298 U. S. 105 at 110; 80 L. Ed. 1070 (1936), the Supreme Court in considering the phrase “any court of competent jurisdiction” contained in Paragraph 20 of Section 1 of the Interstate Commerce Act, held that the U. S. District Court in Idaho had jurisdiction to judicially review and set aside an Administrative Order of the I. C. C.

In *Wong Yang Sung v. McGrath*, 339 U. S. 33; 94 L. Ed. 617 (1950), reversing the dismissal of a writ of habeas corpus of an alien ordered deported, and commenting upon the purpose of the Administrative Procedure Act, the U. S. Supreme Court stated (p. 41):

“More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.”

The U. S. District Court, in which these local *in rem* actions have been pending for nearly five years, is a court of competent jurisdiction and is the proper venue in which

to judicially review the final acts and Orders of the appellants.

The relief demanded by the plaintiffs is within the scope of review and can be granted by a reviewing court of competent jurisdiction. The pleadings seek:

“To cancel the fraudulent and void appointment of conservator, to quiet title, for return of property, declaratory relief, accounting and injunction.” [R. 2960.]

The appellants seized and held such California property solely under muniments of color of title or right, if any, contained in the four Orders Nos. 5082-3-4 and 5254.

The complaints of plaintiffs, and the cross-complaints of the Long Beach Association and others, attack these four Orders and claim, in substance, that they are individually and collectively void *ab initio*, as having been arbitrarily, fraudulently and/or unlawfully issued [R. 2, 287, 323, 564, 2960, 3188, 6736, 6798, 6850, 9466].

The Administrative Procedure Act (5 U. S. C. 1009) provides (Sec. 10):

“(e) SCOPE OF REVIEW:—So far as necessary to decision and where presented *the reviewing court shall* decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in ac-

cordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law (5) unsupported by substantial evidence. . . .” (Emphasis added.)

Under (B) of Section 10(e) above, the U. S. District Court may find that any, or all, of said Orders Nos. 5082-3-4 and/or No. 5254, unlawful and set aside the agency action, upon any one or more of the various grounds listed in the section.

Under (A) of Section 10(e), the U. S. District Court might compel the agency to restore Districts 11 and 12 and reactivate the Federal Home Loan Bank of Los Angeles, which action has been so “unlawfully withheld and unreasonably delayed” for nearly five years, since July 25, 1946, when, after full investigation, the “Smith Committee” of Congress recommended:

“(1) That the commissioner revoke the Order reducing the number of districts from 12 to 11 in the Federal Home Loan Bank System.”

“(2) That the commissioner take all necessary steps to re-establish a Federal Home Loan Bank at Los Angeles and a Federal Home Loan Bank of Portland and revoke the order or Orders by which the assets of these two District Banks were intermingled.” [R. 9107 to 9191.]

(“Tenth Intermediate Report of the Select Committee to Investigate Executive Agencies” House of Representatives, 79th Congress—2nd Session, House Report No. 2659.)

Many other acts and orders of the appellants are within the Scope of Review of the reviewing Court (Sec. 10(e) *supra*).

For example, Order No. 388 of the Board (January 17, 1948—"Rescinding" Order No. 5254) has been reviewed by the U. S. District Court to "determine the meaning or applicability of the terms of any agency action" and the Court on January 23, 1948, made its Order of Restoration of the Long Beach Association. Enforcement of this final Order is still pending before the U. S. District Court. The appellant, Ammann, has not yet filed "a full and complete accounting" satisfactory to the Court [R. 8992].

The acts and Orders of the appellants, including, among others, Orders Nos. 5082-3-4, 5424, 388 and including enjoined Order 2015, are all within the Scope of Review of the U. S. District Court.

Preliminary Injunction is proper Interim Relief to preserve the status pending conclusion of the judicial review of the acts and Orders of the Federal Home Loan Bank Board (Commissioner Fahey) and its successors.

Irreparable damage would be done by the holding of even a "mock" hearing with the announced intention of appointing a receiver for a solvent financial institution, such as is envisioned by Board Order No. 2015.

The appointment of a so-called conservator (Rescinded Order 5254) caused a \$10,000,000.00 "run" in 1946. This second attempt by the appellants to, in 1950, again seize the Long Beach Association and under the *aegis* of Order No. 2015 to appoint appellants themselves "receivers" of this solvent Association, constitutes a threat of irreparable injury which it is necessary to prevent by

the affirmance of the issuance of this Preliminary Injunction.

The Administrative Procedure Act (5 U. S. C. 1009), provides (Sec. 10):

“(d) Interim Relief: Pending judicial review any agency is authorized where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, *every reviewing court* (including every court to which a case may be taken on appeal from, or upon application for, certiorari, or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective sale of any agency action or to preserve status or rights pending conclusion of the review proceedings.”

The issuance of this Preliminary Injunction postponing agency action under Order 2015 was proper to prevent irreparable injury and to preserve status and rights until the conclusion of the review proceedings still pending before the U. S. District Court.

The Procedure for Judicial Review under the Administrative Procedure Act (5 U. S. C. 1009) being remedial and procedural in character, is applicable even though its effective date was September 11, 1946, *i. e.*, subsequent to the seizure Orders of March 29, 1946, and May 20, 1946.

In *Pittsburg S. S. v. National Labor Relations Board*, 180 F. 2d 731 (1950) (Certiorari granted 339 U. S. 951

—pending), the effect upon a prior Order of the National Labor Relations Board of the Administrative Procedure Act was under specific consideration by direction of the U. S. Supreme Court in a previous appeal of the same case, 337 U. S. 656 at 661; 93 L. Ed. 1607 (1949). In holding the Administrative Procedure Act applicable for review of the prior Board Order, which the Circuit Court of Appeals declined to enforce, it said:

(Page 733):

“ . . . A remedial provision is applicable to pending actions. *Ex Parte Collet*, 337 U. S. 55, 69 S. Ct. 944, 959. In accordance with this rule since the decision of the Board preceded the enactment, the Administrative Procedure Act and the Taft-Hartley Act were applicable to the judicial review.”

“The Board concedes that the review in this court is controlled by the two statutes, but contends that the scope of judicial review as to findings of fact has in no way been affected by them. We think this contention is erroneous. The provisions of Sec. 10(e) of the Administrative Procedure Act that the reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be ‘unsupported by substantial evidence’ and that in making this determination the court shall ‘review the whole record’, is new. Moreover, the rules concerning evidence have been expressly changed by both the Taft-Hartley Act and the Administrative Procedure Act. . . .” (Emphasis added.)

3. THE INHERENT RIGHT OF COURTS TO JUDICIALLY REVIEW ADMINISTRATIVE ORDERS WHICH VIOLATED PERSONAL RIGHTS existed even before the Administrative Procedure Act.

In *Fahey v. Mallonee*, 332 U. S. 245 (this case) the U. S. Supreme Court stated:

“Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution there are no remedies.”

The U. S. Supreme Court recognized the right to judicial review in this case by referring to both the Administrative Procedure Act and to the cases of *Stark v. Wickard*, 321 U. S. 288, 88 L. Ed. 733 (1943) and *Federal Reserve System v. Agnew*, 329 U. S. 441, 91 L. Ed. 408 (1947), both of which upheld the right to judicial review before the Administrative Procedure Act was adopted.

In *Federal Reserve System v. Agnew* (*supra*) the U. S. Supreme Court held that the:

(Page 444):

“claim to the office of director is such a personal one as to warrant judicial consideration of the controversy.”

The Board and appellants there, as they do here, relied upon the case of *Adams v. Nagel*, 303 U. S. 532, 82 L. Ed. 1001 (1937), but the Court, after mentioning it, declined to follow it, stating:

(Page 444):

“A majority of the court, however, is of the opinion that the determination of the extent of the au-

thority granted the Board to issue removal orders under Paragraph 30 of the Act is subject to judicial review and that the District Court is authorized to enjoin the removal if the Board transcends its bounds and acts beyond the limits of its statutory grant of authority.”

The right to exercise the incidents of ownership over one's own property, here claimed by this appellee, the shareholder owners of the Long Beach Association, would appear to warrant judicial consideration as much, if not more, than the right to office of a director.

Irrespective of the applicability of the Administrative Procedure Act the right of judicial review of arbitrary, unlawful acts of Administrative Agencies is a judicial function entrusted to the courts by their creation by Congress. It is a power inherent in courts. (*Federal Reserve System v. Agnew*, 329 U. S. 441, 91 L. Ed. 408 (1947); *Stark v. Wickart*, 321 U. S. 288, 88 L. Ed. 733 (1943); *Columbia Broadcasting System v. U. S.*, 316 U. S. 407, 86 L. Ed. 1564 (1942); *U. S. v. Morgan*, 307 U. S. 183, 83 L. Ed. 1211 (1938).)

The U. S. District Court has jurisdiction to judicially review Federal Home Loan Bank Administration Orders Nos. 5082-3-4 and No. 5254, and the subsequent Home Loan Bank Board Orders Nos. 388, 2015, and others:

1. As muniments of color of title to be reviewed in an action to quiet title to California property.
2. Under the Administrative Procedure Act, and
3. Under the inherent power of courts to judicially review Administrative Acts.

II.

THE LAW OF THE CASE HAS ESTABLISHED
JURISDICTION.

It is the Law of this Case that the U. S. District Court at Los Angeles has jurisdiction of the subject matter and of the parties and this is now *res adjudicata*.

A. THE U. S. SUPREME COURT HAS TWICE RECOGNIZED THAT U. S. DISTRICT COURT HAS JURISDICTION.

FIRST: When it refused to dismiss as requested by these appellants (App. Br. S. Ct. p. 100),⁴ but instead remanded the case to the U. S. District Court at Los Angeles:

“Without prejudice to any other administrative or judicial proceedings which may be warranted by law. The judgment is reversed.”

Fahey v. Mallonee, 332 U. S. 245, 91 L. Ed. 2030, 67 S. Ct. 1552 (1947). The Supreme Court indicated that the case should be tried on the merits, stating:

(Page 257):

“It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs’ charges that ill will and malice actuated the supervising authorities, as well as the charges of the defendant that the institution has been mismanaged and that the management is unfit, are alike undetermined by the courts below, and we make no determination or intimation concerning the merits of these issues or as

⁴App. Br. S. Ct. refers to these appellants’ brief to the U. S. Supreme Court, *Fahey, et al. v. Mallonee, et al.* (No. 687), 332 U. S. 245, 91 L. Ed. 2030 (1947).

to other remedies or relief than that in the judgment before us.”

SECOND: When it denied these appellants leave to file a petition for Writ of Mandamus and/or Prohibition and/or Injunction to prevent the payment of expenses and attorneys’ fees. These appellants there sought to:

(Page 259):

“ . . . Vacate his Order allowing fees to counsel in *Fahey v. Mallonee*, 332 U. S. 245, 67 S. Ct. 1551, to prohibit any further allowance therein and to enjoin any payments heretofore allowed.” *Ex parte Fahey et al.*, 332 U. S. 258 (1947), 67 S. Ct. 1558.

Justice Jackson, in the opinion denying permission to file petition for Writ, stated:

(Page 260):

“We find nothing in this case to warrant their use. An allowance of \$50,000.00 will hardly destroy a \$26,000,000.00 association during the time it would take to prosecute an appeal. The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals. We hold that the applicants’ grievance is one to be pursued by appeal at the proper time and in the appropriate court, rather than by resort to our original jurisdiction for extraordinary writs. The petition is denied.” *Ex parte Fahey*, 332 U. S. 258 at 260, 91 L. Ed. 2041 (1947).

Petitions for writs historically and primarily attack and put in issue the jurisdiction of the trial court. Certainly had there been any question as to the jurisdiction of the U. S. District Court, the U. S. Supreme Court would

not have indicated that \$50,000.00 should be paid to the plaintiff's attorneys before trial from monies interplead in the Registry of the Court.

B. THIS CIRCUIT COURT OF APPEALS HAS LIKEWISE RECOGNIZED THAT THE U. S. DISTRICT COURT HAS JURISDICTION of the persons and subject matter involved in this litigation, thereby following the precedent of the U. S. Supreme Court.

On December 5, 1947, this Circuit Court of Appeals after argument, denied these appellants' motion for a super-sedeas to stay the payment of an Order for attorneys' fees, pending an appeal (No. 11751) which was later dismissed, on February 6, 1948.

On June 1, 1950, this Honorable Court of Appeals for the Ninth Circuit denied these same appellants:

“Leave to file petition for writ of prohibition, mandamus, or other appropriate relief and for rule to show cause.”

The Bank of San Francisco and the United States presented separate petitions, but both made the same, worn out attack upon the jurisdiction of the U. S. District Court.

On September 5, 1950, this Circuit Court of Appeals, after argument, again denied these appellants' “motions for a stay of payment of attorneys' fees”, pending appeal No. 12591. Again, these appellants urged that the “District Court lacks jurisdiction over said consolidated actions and each one thereof. . . .” (Appellants' Motion for Stay of Execution, etc., p. 8, Appeal No. 12591—C. C. A. 9).

The denial by the U. S. Supreme Court and by this U. S. Circuit Court of Appeals of the appellants' repeated applications for Writs and the denial by this U. S. Circuit Court of Appeals of the two motions of these appellants for "Stay of payment of attorneys' fees" pending appeals Nos. 11751 and No. 12591 "*A fortiori*" are, in effect, findings by both the U. S. Supreme Court and by this Circuit Court of Appeals that the U. S. District Court has jurisdiction.

The Law in this case is established by appellate decisions herein that the U. S. District Court at Los Angeles has jurisdiction.

C. MANY PRIOR, FINAL JUDGMENTS, HAVE ESTABLISHED THE LAW OF THIS CASE TO BE THAT THE U. S. DISTRICT COURT HAS JURISDICTION OF THE SUBJECT MATTER AND THE PARTIES. In the more than 100 hearings in this litigation during the past nearly five years, the U. S. District Court has made many final appealable findings of fact, conclusions of law, Orders and judgments. Many of these final judgments have been recognized and accepted as final by these same appellants, by their compliance therewith.

Likewise, many of these orders and judgments have become final in law by either appeals dismissed, or by failure to appeal.

In these judgments the jurisdiction of the court over the subject matter and the parties has either been specifically found or is implied as inherent in all judgments.

(Page 171):

"Every Court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the par-

ties and the subject matter.” *Stoll v. Gottlieb*, 205 U. S. 165, 83 L. Ed. 104 (1938); *Walling v. Miller*, 138 F. 2d 629 (1943).

Of the many final judgments and/or decrees in which the jurisdiction of said U. S. District Court has been specifically found, recognized or exercised, we will discuss only ten:

1. On September 2, 1947 the U. S. District Court filed its:

“Findings of Fact, Conclusions of Law and Order for interim partial allowance on account of expenses and attorneys’ fees incurred by the plaintiffs, the Shareholders Protective Committee, prior to March 19, 1947” [R. 2350].

It was specifically found that:

“(2) The Court has jurisdiction of the persons and subject matter involved.” [R. 2354.]

This Finding was before this Court on December 5, 1947, when it denied these appellants’ application for a Stay pending appeal No. 11751, *Ammann v. Mallonee*, which was dismissed on February 6, 1948, and the case remanded to the U. S. District Court for further proceedings [R. 3550].

It is now the Law of this Case that said U. S. District Court has jurisdiction of the persons and subject matter involved. All of the parties hereto have relied and acted upon this being the Law of this case.

2. Prior to December 26, 1947 the U. S. District Court made its:

“Order requiring deposits of notes, deeds of trust, requests for reconveyances, and money.” [R. 2852.]

in approximately 50 intervention proceedings by various petitioners seeking to clear the titles to their homes located in Southern California. [Listed in Footnote R. 8288-8291.] In these interpleader and intervention matters final Orders were made by the U. S. District Court upon which the parties, the title companies and the general public have relied, to clear and make marketable the titles to approximately 480 homes of Southern California residents.

On December 26, 1947 these appellants appealed [R. 3152] from some of such orders, including:

a. Ethel A. Cameron—Order of intervention filed November 28, 1947—which ultimately resulted in clearing title to her home by the deposit in the Registry of approximately \$7,300.00 [R. 2852].

b. Wrigley Heights Inc. and Wrigley Heights Second, Inc.—Orders filed November 28 and December 2, 1947, respectively, which ultimately resulted in clearing title to approximately 65 parcels of real property by the deposit in the Registry of approximately \$325,000.00 [R. 2861 and 2883].

c. Clayton T. and Melba D. Hobba—Order filed December 2, 1947 which ultimately resulted in clearing title to their home by the deposit in the Registry of approximately \$3,700.00 [R. 2873].

d. Owen D. and Ruby M. Fields—Order filed December 5, 1947, which ultimately resulted in clearing title to their home by the deposit in the Registry of approximately \$3,500.00 [R. 2949].

Appeal No. 11867 of these appellants from the Orders of the U. S. District Court permitting the intervention of home owners to clear the titles to their Southern California

homes was finally dismissed on February 25, 1948, and remanded to the U. S. District Court for further proceedings and was spread April 19, 1948 [R. 3976].

By the dismissal of Appeal No. 11867 on February 25, 1948, the Law of this case became established that the U. S. District Court had jurisdiction to remove encumbrances and clouds from the titles to the homes of Southern California residents.

3. On January 23, 1948, the U. S. District Court entered its

“Order that the petition of the Shareholders be granted and that the conservator for the Long Beach Federal Savings and Loan Association be removed and its assets returned to the directors and officers of the Association.” [R. 3442 and 8310.]

Among other things, the Order states:

“The Court therefore reserves full power, both under this order and under its otherwise *existing jurisdiction*, to make all necessary, expedient or proper additional or later orders or decrees or judgment.” (Emphasis added.) [R. 8327.]

This order was made following the filing of Board Order No. 388 (dated January 17, 1948), pursuant to directions therein a certified copy was delivered to the U. S. District Court [R. 8310]. This constituted a confession of judgment by the appellant, Home Loan Bank Board. The specific terms of the “Order of Restoration” were approved by counsel for the “Washington Appellants” [R. 8328]. There was no appeal from this final order of restoration. The appellants have partially, but not fully, complied with the Court’s Order, and have returned to the

Long Beach Federal Savings and Loan Association some, but not all, of its assets.

This “Order of Restoration” has become final, and it is now the Law of this case that the U. S. District Court has jurisdiction of the Long Beach Association and all of its assets, and of all parties retaining possession of, or claiming any right, title or interest in said Association, or its assets.

4. On March 13, 1948, the U. S. District Court at Los Angeles made its

“Order requiring deposit of certain notes, deeds of trust, U. S. Government Bonds and other collateral held by the Federal Home Loan Bank of San Francisco” [R. 3772].

This Order with its Findings of Fact and Conclusions of Law, is attached as an exhibit to the Preliminary Injunction here now on appeal [R. 8399 to 8525].

It contains lists specifically describing the notes, deeds of trust, bonds and collateral securities required to be deposited in court [R. 8421 to 8524].

The Court specifically finds that:

“That by custom and usage in the County of Los Angeles, State of California, policies of title insurance are required for marketable and merchantable title to real property to be sold, encumbered, or conveyed in said County and State.”

“That if such payment by said Long Beach Federal Savings & Loan Association of said sum be made to one of said conflicting claimants, to the exclusion of the other (Federal Home Loan Bank of San Francisco v. Federal Home Loan Bank of Los Angeles)

and the other claimant thereafter would be held to have been entitled to such payment, then the owners of the various properties under trust deeds may each be subjected to claims upon their notes and property for a portion of said total liability (now approximately \$6,300,000.00) which possible liability exists as a cloud upon the title to each of the thousands of properties involved and prevents each of them from securing a merchantable and insurable title, unless the within Order is made. That the making of the within Order thus avoids the complex, multiple, and conflicting claims and demands which may be made upon the approximately 8,000 individual borrowers of said association.” (Inserts and emphasis added.)

“That all of the assets and properties, herein described, notes, deeds of trust, U. S. Government Bonds, and other collateral are physically within the confines and boundaries of the Southern District of California and *thus physically within the jurisdiction of this court.* . . .” [R. 8412.]

“. . . The court therefore reserves full power, both under this order and the order to show cause and the Motion which brought this proceeding to this hearing and also under its *otherwise existing jurisdiction* to make all necessary expedient or proper, or later, Orders, decrees or judgments.” (Emphasis added.) [R. 8524.]

The appellants, San Francisco Bank, complied with said Order without appeal, and deposited in the Registry of the U. S. District Court bonds, notes, deeds of trust and collateral securities [R. 3775, etc.] amounting to approximately \$14,000,000.00; yet now, three and one-half years later, appellants urge that the U. S. District Court was without jurisdiction.

This was an appealable order in Interpleader, which has become final, and the Findings of Fact and Conclusions of Law that the U. S. District Court has jurisdiction of the properties interplead and the parties claiming any interest therein are now the law of this case and *res adjudicata*.

The following six final Orders were made subsequent to March 19, 1948, the effective date of the amendment to 54(b) F. R. C. P.

5. On March 26, 1948, the U. S. District Court entered its:

“Order for delivery of notes and trust deeds (excess collateral) from Clerk of Court to Long Beach Federal Savings and Loan Association” [R. 3869 and 8526].

The Court specifically found it had jurisdiction:

“The Court, therefore, reserves full power both under this Order and under the Order dated March 13, 1948, and the Order to Show Cause and Motions which brought proceedings to hearing and also under its *otherwise existing jurisdiction* to make all necessary, expedient, or proper additional, or later, Orders, decrees or judgments.” (Emphasis added.) [R. 8535.]

Pursuant to this final Order, which was not appealed, the Clerk of the U. S. District Court released to the Long Beach Association several millions of dollars of excess collateral which since has been dealt with, transferred, conveyed and released to the general public, hence, it would appear that this Order, likewise, was a “final disposition of a claimed right.” (*Cohen v. Beneficial Industrial Loan Corporation*, 337 U. S. 541, 93 L. Ed. 1531 (1949).)

The jurisdiction of the U. S. District Court has become established as the Law of the Case and is *res adjudicata*.

6. On July 30, 1948, the U. S. District Court made its:

“Findings of Fact, Conclusions of Law and Interlocutory Decree of Injunction.”

enjoining the Northern Ten Associations (plaintiffs there) from proceeding with subsequently filed action, No. 28203-G, in the Northern District of California, which involves some of the same property, parties and issues. [R. 4722 and 8362, etc.]

The Court specifically found it had jurisdiction:

“XI.

“. . . That said proceedings, orders, activities, or other matters would interfere with the interpleader jurisdiction of this Southern District Court and would impede, harass, and obstruct the execution of its process, orders and judgment, and would expose said parties to the danger of having to litigate in two separate United States District Courts in separate districts the same matters which they have already litigated for more than two years in this Southern District Court.” (Emphasis added.) [R. 8371.]

The U. S. District Court in and for the Northern District of California, Southern Division, recognized said “Interlocutory Decree of Injunction” and has suspended all proceedings in said action No. 28203-G. This was an appealable “Interlocutory Injunction” (28 U. S. C. 1292), but it was not appealed. The findings therein are now final.

7. On February 2, 1949, the U. S. District Court filed its:

“Preliminary Injunction Enjoining Prosecution of Remanded Action and Order of Remand.” [R. 5798 and 8377.]

of subsequently filed action No. L. B. C. 14492, to the Superior Court of California, which action involved some of the same properties, parties and issues [R. 8389].

The Court specifically found it had jurisdiction:

“That the interpleader jurisdiction of this Court has been invoked by many of the parties litigating.

That among such interpleaders are that of Title Service Company, involving \$12,000,000.00 of notes and deeds of trust and the titles to the alleged homes of 8,000 borrowers from said Association; Robert H. Wallis involving a \$50,000.00 cashiers check concerning said Association’s defense; said Association itself, concerning notes, deeds of trust, United State Government Bonds, money and other securities aggregating approximately \$14,000,000.00; by George Turner, defendant and cross-claimant, involving a lease of part of the land, building and premises in which said Association maintains its offices and conducts its business.

“That by the various pleadings of the various parties to any or all of said interpleader proceedings, issues have been made concerning the class of 16,000 depositors, whose \$22,000,000.00 in savings are represented in part by some or all of said interplead assets, money and property. That such interpleader proceedings purport to bind not only the Mallonee group of plaintiffs, as representatives of said class, but said Newendorp and Bradley likewise as members

of said class and as alleged representatives of said class.

“That it is equitable and proper that all such conflicting and contradictory claims of the litigating class plaintiffs and their derivative stockholders actions, if litigated in any court, should all be presented to, and considered by, this court having jurisdiction in interpleader in addition to all other grounds of jurisdiction.” (Emphass added.) [R. 8395 and 8396.]

This was another appealable Interlocutory Injunction (28 U. S. C. 1292) which was not appealed. The Finding that the U. S. District Court has jurisdiction, as well as the other Findings therein, have become final and are now the Law of this Case and are *res adjudicata*.

It should be pointed out that the above two Interlocutory Injunctions (Nos. 6 and 7 above) were made since March 19, 1948, the date when the amendment to Rule 54, F. R. C. P. became effective. They do not contain an “express determination that there is no just reason for delay nor an express direction for the entry of judgment.” Hence, appellants may argue that they are not final, appealable judgments.

This argument would, of course, apply equally to the “Preliminary Injunction with Findings,” the subject of this appeal, No. 12511, as it contains no “express determination that there is no just reason for delay” nor any “express direction for the entry of judgment” as now required by Rule 54(b), F. R. C. P. This contention appears to be answered by the specific provisions of 28, U. S. C. 1292 which gives courts of appeal appellate jurisdiction of Interlocutory Injunctions.

8. On April 1, 1949, the U. S. District Court made
“Findings of Fact, Conclusions of Law and Order
for Interim Allowances on Account of Expenses and
Costs Allowed March 22, 1949” [R. 6427],

specifically finding:

“2. That the court has jurisdiction of the parties
and subject matter involved.” [R. 6436.]

The Court expressly made the order appealable and
final in conformance with the provisions of the amend-
ment to Rule 54(b), F. R. C. P., by expressly stating:

“The court hereby expressly determines that there is
no just reason for delay in decision of the matters
herein contained and expressly directs the entry of
the judgment contained herein.” [R. 6457.]

No appeal was taken from this Order and pursuant
thereto the Clerk of the U. S. District Court paid to the
various parties, out of the Registry of the Court, more
than \$37,000.00.

This Order is now final and the Findings of Fact and
Conclusions therein that the Court has jurisdiction of the
parties and subject matter is now the Law of the Case
and *res adjudicata*.

9. On May 10, 1949, the U. S. District Court made:

“Findings of Fact, Conclusions of Law and Order
for Interim Allowances on Account of Attorneys’
Fees incurred prior to December 15, 1948.” [R.
6527.]

specifically finding:

“4. That the court has jurisdiction of the parties
and subject matter involved for the purpose of this
Order.” [R. 6541-2.]

The Court expressly made the Order appealable and final, in compliance with the provisions of the amendment to Rule 54(b), F. R. C. P.:

“and the Court expressly determines that there is no just reason for delay upon the matters herein contained and expressly directs and orders the entry of the judgment contained herein.” [R. 6545.]

No appeal was taken and this Order is now final and the specific Findings and Conclusions of Law that the Court has jurisdiction is now the Law of this Case and *res adjudicata*.

10. On April 5, 1950, the U. S. District Court entered its:

“Findings of Fact, Conclusions of Law and Order for Substitution of Parties Plaintiff,”

specifically finding, on page 3:

“(3) that this court has heretofore after extended hearings by various orders, held that it has jurisdiction of the parties and subject matter of the within litigation, from certain of which orders appeals were taken by the Home Loan Bank Board and/or its agents and thereafter dismissed, and upon which order, as well as said other orders so holding, the time of appeal has passed for a considerable period.” [Clk. Tr. p. 19216.]

The Court expressly made the order appealable and final as now required by Rule 54(b), F. R. C. P. This order is printed in the appendix, Exhibit D.

This order was not appealed and the Findings of Fact and Conclusions of Law therein have become final and

again unmistakably establish that it is the Law of the Case and *res adjudicata*; that the U. S. District Court has jurisdiction of the parties and subject matter of this litigation.

D. FINAL JUDGMENTS, THOUGH PARTIAL, ESTABLISH THE JURISDICTION OF THE COURT AS THE LAW OF THE CASE AND RES ADJUDICATA. THERE IS NO RIGHT TO LITIGATE THE SAME QUESTION TWICE.

For nearly five years these appellants, co-defendants standing charged with a fraudulent co-conspiracy, have repeatedly urged various and sundry dilatory pleas in abatement rather than face a trial on the merits. In the U. S. District Court, in this Ninth Circuit Court of Appeals and in the U. S. Supreme Court they have repeatedly urged lack of jurisdiction, indispensable parties, exhaustion of administrative remedies, immunity to suit and similar matters of abatement. These dilatory pleas must be disposed of before factual determination can be had on the merits. Jurisdiction of the person can be waived in many ways, such as by stipulating, by general appearance, by seeking affirmative relief, etc., all of which are here present. All such dilatory pleas once determined by the trial court become finally determined upon the final determination of the first appealable Order thereafter. The U. S. District Court, on numerous occasions, has determined all of these dilatory pleas of the defendants adversely to them. Many subsequent appealable Orders have become final.

Once a Court has determined its own jurisdiction by a final judgment, partial or otherwise, the losing parties

cannot thereafter again attack jurisdiction, even though the decision was erroneous.

In *Dickinson v. Petroleum Conversion Corp.*, 338 U. S. 507, 70 S. Ct. 322, 94 L. Ed. 299 (1950). There were allegations of fraudulent conversions in complicated stock transfer situations. Like here, there were numerous interventions, counter claims, etc. On April 10, 1947 (prior to the amendment of 54(b), F. R. C. P.) a decree was entered adjudicating part of the controversy, this was not appealed.

Subsequently, a final decree was entered adjudicating other issues, and the appellants, there as here, attempted to again raise various issues which were within the contemplation of the prior partial final judgment. The U. S. Supreme Court held that the prior Order made before the amendment to 54(b), F. R. C. P., was a final appealable Order and that all matters therein adjudicated became the Law of the Case and *res adjudicata* and, hence, could not be again urged upon a subsequent appeal.

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 93 L. Ed. 1528 (1949), was a class action by stockholders who alleged a fraudulent conspiracy. The defendants, as in the instant case, rather than meet the issue on its merits, attempted to plead, in abatement, a New York Statute which required the plaintiffs, as individuals, in the class action representing the 16,000 shareholders to post a bond of \$125,000.00 for costs and expenses. The District Court declined to fix bond. The U. S. Supreme Court, in holding that the Order declining to fix bond was appealable, stated:

“When that time comes, it will be too late effectively to review the present Order and the rights conferred

by the statute, if it is applicable, will have been lost, probably irreparably.” . . .

* * * * *

“We hold this Order appealable because *it is a final disposition of a claimed right* which is not the ingredient of the cause of action and does not require consideration with it.”

In *Stoll v. Gottlieb*, 205 U. S. 165, 83 L. Ed. 104 (1938), the plan of reorganization in a 77(b) proceeding was confirmed by the U. S. District Court over the objection of others of the same class as the plaintiffs who did not appear at the hearing, but subsequently filed a petition for modification of the Order which had cancelled a guaranty for their benefit. Plaintiffs plea that the Court lacked jurisdiction to cancel the guaranty was denied, but not appealed, and became final. Plaintiffs then obtained a judgment on the cancelled guaranty in the State Court of Illinois. The U. S. Supreme Court held that the question of jurisdiction of the U. S. District Court had been decided by that Court, and that no appeal having been taken from such decision, right or wrong, the judgment of the District Court upon its own adjudication that it had jurisdiction, was final, and reversed the Supreme Court of Illinois, stating:

(Page 171):

“The inquiry is to be directed at the conclusiveness of the order releasing the guarantor from his obligation, assuming the bankruptcy court did not have jurisdiction of the subject matter of the order, the release in reorganization of a guarantor from his guarantee of the debtor’s obligation.”

* * * * *

“Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter.”

* * * * *

(Page 172):

“We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.”

The U. S. Supreme Court quotes with approval from a decision of the Supreme Court of Oregon:

(Page 175):

“But that was a question which the Circuit Court of the United States was competent to determine in the first instant. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise, than on writ of error or appeal to this court.”

In *Baldwin v. Iowa Travelling Men, etc.*, 283 U. S. 522, 75 L. Ed. 1245 (1931), the U. S. Supreme Court

in declining to permit the relitigation of the subject of jurisdiction stated:

(Page 524):

“The respondent, on the other hand, insists that to deprive it of the defense which it made in the court below, of lack of jurisdiction over it by the Missouri District Court, would be to deny the due process guaranteed by the 14th Amendment; but there is involved in the doctrine no right to litigate the same question twice. (Citing authorities.)”

“The substantial matter for determination is whether the judgment amounts to res judicata, on the question of the jurisdiction of the court which rendered it over the person of the respondent. It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. . . . The special appearance gives point to the fact that the respondent entered the Missouri Court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. . . .”

In *Dugas v. American Surety Co.*, 300 U. S. 414, 81 L. Ed. 720 (1936). Similarly, a subsequent attack on interpleader jurisdiction was denied. Similarly, in *American Surety Co. v. Baldwin*, 287 U. S. 156, 77 L. Ed. 23 (C. C. A. 9, 1932), it was held that denial of a motion to vacate was an adjudication of jurisdiction which thereby became *res adjudicata*.

Jurisdiction once finally determined becomes the Law of the Case and is *res adjudicata*.

Chicot, etc., v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329 (1940);

Walling v. Miller, 138 F. 2d 629 (1943).

In *Trienies v. Sunshine Mining Co.*, 308 U. S. 66, 84 L. Ed. 85 (C. C. A. 9, 1940), the Supreme Court in refusing to permit relitigation of the issue of jurisdiction once decided, said:

“One trial of an issue is enough. The principles of *res adjudicata* apply to questions of jurisdiction as well as to other issues—as well to jurisdiction of the subject matter as of the parties.” (Emphasis added.)

These same appellants have litigated all possible questions of jurisdiction of the U. S. District Court at Los Angeles over the parties and the subject matter. Though repeatedly attacked, its jurisdiction has never been denied by any Appellate Court in this litigation. Appellants have lost these issues of jurisdiction in the U. S. Supreme Court, in this Honorable Court of Appeals and in the District Court at Los Angeles not once, but on repeated occasions, in 1947, 1948, 1949, 1950 and, we hope, for the last time, on this appeal in 1951.

With 20,000 pages of printed record, more than 100 Court hearings, innumerable final judgments, in nearly five years of litigation, the dilatory plea as to lack of jurisdiction should, at last, be “laid to rest” and the litigation be ordered to proceed to an adjudication on the merits.

“It is just as important that there should be a place to end as that there should be a place to begin litigation.” (*Stoll v. Gottlieb, supra.*)

It is the Law of this Case that the U. S. District Court at Los Angeles has jurisdiction of the subject matter and of the parties and the question of jurisdiction now is *res adjudicata*.

III.

PRELIMINARY INJUNCTION TO PRESERVE
THE STATUS QUO.

A. Generally, the Court first acquiring jurisdiction over the property, the *res*, should exercise its jurisdiction to the exclusion of all other forums. It should issue its injunctions, if and when necessary, to restrain the parties from participating in any actions involving the same *res* in any other forum.

In *Looney v. East Texas Ry. Co.*, 247 U. S. 216, 62 L. Ed. 1084 (1918), the U. S. Supreme Court, in sustaining the enjoining of a State Attorney General in connection with I. C. C. Orders, stated (page 220):

“ . . . our conclusion is that the present status should be maintained until such time as this court may consider all of the grave questions of Law and all of the great mass of facts connected with this complicated and important litigation. . . . ”

* * * * *

(Page 221):

“The use of the writ of injunction by Federal Courts first acquiring jurisdiction over the parties or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties is a familiar and long established practice.” (Citing authorities.)

The doctrine that the Court first acquiring jurisdiction should retain the same exclusively until it has finally de-

terminated all of the issues and matters involving the *res*, is well established.

City of Orangeburg v. Southern Ry. Co., 134 F. 2d 890 (1943);

Penn. Co. v. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850 (1935);

Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 54 L. Ed. 1032 (a 1910 California-Nevada Water case).

In *United States v. Union Pacific Railway Co. and Western Union Telegraph Co.*, 160 U. S. 3, 40 L. Ed. 319 (1895), the U. S. Supreme Court stated the rule of the jurisdiction of equity to give complete relief in one trial, in this language:

(Page 51):

“But a suit in equity by the United States against both companies for the purpose of annulling the agreements under which the telegraph company claims rights adverse to the United States, can embrace all the matters in controversy and authorize a comprehensive decree that will terminate all disputes among the parties as to such matters.” (Citing cases.)

* * * * *

(Page 52):

“We are of the opinion that the Circuit Court properly adjudged that equity had jurisdiction to give full relief in respect to all matters in issue between the United States and the defendant companies.”

Courts will enjoin interference with those in possession of property under the Court’s judgment and in such cases the jurisdiction of the Court may be invoked by supple-

mental proceedings. *Julian v. Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629 (1904), where the Court stated:

(Page 114):

“We are here dealing with a right and title conferred by authority of the decree of a Federal Court, which may be virtually set aside and held for naught, if the property awarded can be taken upon execution in suits to which the purchaser is not a party.”

The jurisdiction of the U. S. District Court having once attached cannot be taken away, diminished or interfered with by proceedings subsequently instituted in any other forum.

Peoples Bank of Belleville v. Winslow (Calhoun interpleader), 102 U. S. 256, 26 L. Ed. 101 (1880);

Dugas v. American Surety Co., 300 U. S. 414, 81 L. Ed. 720 (1936).

U. S. District Courts in the exercise of, and to protect their jurisdiction, have power to, and should when necessary, restrain unlawful acts. *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232, 94 L. Ed. 22 (1949), restraining a union from discriminatory acts. Likewise, U. S. District Courts should, when necessary, restrain unlawful acts of Federal officers, agencies and boards. In *Jaeger v. Simray*, 180 F. 2d 650 (C. C. A. 9, 1950), an Administrative hearing of the Immigration Commissioner to cancel an alien's certificate of lawful entry, was enjoined.

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209 (1947), approved the restraining of the U. S. Maritime Commis-

sion from selling the plaintiff's stock under a claim of ownership by the United States, which ultimately was found to be invalid and the stock ordered restored to the plaintiff. (*Dollar v. Land*, No. 10299, C. C. A. of D. C., July 17, 1950.)

City of Orangeburg v. Southern Railway Co., 134 F. 2d 890 (1943), restrained the city from foreclosing a paving assessment. In *Philadelphia Company v. Stimson*, 223 U. S. 604, 56 L. Ed. 570 (1912), Mr. Justice Hughes, in delivering the unanimous opinion of the Court, stated:

(Page 619):

“First. If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.” (Citing cases.) “And in case of an injury threatened by his illegal action the officer cannot claim immunity from the injunctive process.”

In *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 93 L. Ed. 1231 (1949), endorsement of regulations of the Secretary of the Interior prohibiting salmon fishing in certain areas in Alaska was enjoined. In *Williams v. Fanning*, 332 U. S. 490, 91 L. Ed. 95 (1949), the Postmaster at Los Angeles was restrained from enforcing a fraud Order directing him to seize the plaintiff's money orders.

Nagle v. J. F. T. O'Connor, 88 F. 2d 936 (1937), reversed the District Court for denying a preliminary

injunction to restrain a conservator appointed by the Comptroller of the Currency, from exceeding his authority in levying an assessment on stockholders.

B. The injunctive Protection of Interpleader Jurisdiction is nationwide.

A court of equity having once acquired jurisdiction of an interpleader, has complete, sole and exclusive jurisdiction of the entire proceedings, and should restrain and enjoin the commencement or prosecution in any other forum of any proceedings affecting any part of the *res*, *Treinies v. Sunshine Mining Co.*, 308 U. S. 66 at 74, 84 L. Ed. 85 (1940). In *Fidelity and Deposit Company v. A. S. Reid and Company*, 16 F. 2d 502 at 504 (1926), and in *Ross v. International Life Ins. Co.*, 24 F. 2d 345 (1928), the parties were restrained from prosecuting State Court actions which might interfere with the interpleader jurisdiction of the Federal Courts. In *National Fruit Products Co. v. Dwinell-Wright Co.*, 129 F. 2d 848 (1942), a proceeding in the U. S. patent office was restrained. In *Security Trust and Savings Bank of San Diego v. Walsh*, 91 F. 2d 481 (C. C. A. 9, 1937), on appeal, from *Eagle Star & British Dominion v. Tadlock*, 14 Fed. Supp. 933 (D. C. Cal., 1936), the District Court was reversed for not protecting its interpleader jurisdiction by temporarily enjoining a prior filed admiralty action involving the same properties, even though all claimants were residents of California and diversity of citizenship existed only as to the stakeholder.

The Federal interpleader statutes (28 U. S. C. 2361) and Rule 22, F. R. C. P., were intended to give a court of equity, having interpleader jurisdiction, the power to require all interested parties wherever located to come in and set up their claims in one case for decision at one time, “so as to prevent it from being only a race to the swift.”

Maryland Casualty Co. v. Glassell-Taylor & Robinson, 156 F. 2d 519 (1946);

Dugas v. American Surety Co., 300 U. S. 414, 81 L. Ed. 720 (1936);

Cramer v. Phoenix, etc., 91 F. 2d 141 (1937), certiorari denied 302 U. S. 649, but entry withheld.

Federal Courts are specifically empowered to issue all writs, including preliminary injunctions, which may be necessary for the exercise or protection of their general jurisdiction (28 U. S. C. 1651) and for the protection of their interpleader jurisdiction (28 U. S. C. 2361) (Former Sec. 41(26) Interpleader Rule 22, F. R. C. P.).

Injunction is a proper means of protecting the Court's general jurisdiction (*Camp v. Boyd*, 229 U. S. 529, 57 L. Ed. 1317 (1912)), and its interpleader jurisdiction; *Mallors v. Equitable Life Ins. Soc.*, 87 F. 2d 233 (1936); *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 84 L. Ed. 85 (1940)).

The right of intervention is available to a superior official in any suit where his subordinate is made a party defendant (*Varney v. Warehime*, 147 F. 2d 238 (1945)).

The U. S. District Court at Los Angeles has at all times since the first inception of this litigation on May 27, 1946, afforded a forum open to all those claiming any interest in, or right to control over, any of the properties, associations or banks involved. The U. S. District Court specifically has recognized its own availability in Finding 35, of the present "Preliminary Injunction":

"That the process and powers of this Court are available to said Home Loan Bank Board to protect and preserve the public interest and rights involved in, or necessarily collateral to, this litigation, and to compel the performance of any alleged unfulfilled duty of said association, or any other litigant herein, as well as to protect and preserve the assets and rights of the shareholder members and depositors and borrowers from, and other persons doing business with, said association [R. 8256]."

All parties have been invited to participate in this litigation and present their claims, whatever they may be, to the said U. S. District Court which is available and competent to enforce its adjudication as to the properties involved, all of which are within its territorial jurisdiction.

On the other hand, the proposed Administrative hearing contemplated by Home Loan Bank Board Order No. 2015 did not invite all parties who claim an interest in or to the property, nor would it have been capable of rendering an effective judgment over properties in California and persons and corporations not parties to the proposed Administrative hearing.

IV.

ADMINISTRATIVE REMEDIES—EXHAUSTED.

The shareholders of the Long Beach Association, represented by this appellee, the plaintiff, are afforded no right to any Administrative hearing or procedure and none was given them. The four seizure Orders were final, self executing Orders when issued, as pointed out in discussing jurisdiction for judicial review under the Administrative Procedure Act. (I. E. 2, p. 61, *supra*.) They were each issued in Washington, D. C., without prior notice, hearing or substantial cause, and concurrently executed the same day in California by the appellants.

Neither by statute, rule, regulation nor Order were the shareholders ever afforded any Administrative hearing, or relief for the unauthorized seizure of their properties in California.

The Long Beach Association was summarily seized May 20, 1946, under claim of color of title of Order No. 5254 purportedly adopted by the Federal Home Loan Bank Administration in Washington, D. C., on May 20, 1946. The Shareholders Protective Committee, acting on behalf of all shareholders of the Long Beach Association, as a class who had no other remedy available, commenced this action (5421-P. H. below) on May 27, 1946.

Administrative procedure cannot be invoked to obstruct a proceeding previously pending in the U. S. District Court.

Subsequently, the appellants set a belated, so-called Administrative hearing, for July 1, 1946. Neither the shareholder owners of the properties involved nor this appellee committee, their representative, were notified, nor

have they ever been made parties to any Administrative procedure, or hearing.

Where a board or commission sits in a judicial or quasi judicial capacity, notice is necessary to render their orders due process.

Interstate Commerce Com. v. Louisville & N. R. Co., 227 U. S. 88 at 91, 57 L. Ed. 431 (1913);

Morgan v. U. S. 298 U. S. 468 at 480, 80 L. Ed. 1288 (1936);

Morgan v. U. S., 304 U. S. 1 at 15, 82 L. Ed. 1129 (1937).

Subsequently, after protests [R. 2914], the appellants adopted Home Loan Bank Board Order No. 139, on December 4, 1947, abandoning their Administrative hearing, and on January 17, 1948, adopted Order No. 388 rescinding the appointment of the conservator, partially confessing judgment and submitting the unconfessed issues to the U. S. District Court for decision.

Enjoined Order 2015 is another attempt by appellants to invoke their Administrative (so-called) procedure to obstruct and evade trial on the merits in a Court of competent jurisdiction.

These plaintiffs have no Administrative remedies.

In *Dwinell-Wright Co. v. National Fruit Products Co., Inc.*, 129 F. 2d 848 (1942), in enjoining a patent cancellation proceeding, the Court stated:

(Page 852):

“It has long been settled that a court of equity which has first taken jurisdiction of a case may, in order to prevent vexations and harassing litigation, enjoin

the parties from further proceeding in another forum. . . .”

* * * * *

(Page 853):

“Clearly, it is just as harassing and vexatious and there is just as much waste and duplication of effort involved in twice trying the same issue between the same parties, whether the second trial is before an Administrative tribunal or before a court.” (Emphasis added.)

In *Columbia Broadcasting System v. U. S.*, 316 U. S. 407, 86 L. Ed. 1564 (1942), defendant Federal Communications Commission objected (as do the appellants here) that the plaintiffs must first seek to intervene before the Commission and exhaust Administrative procedure (apparently the plaintiffs there, unlike the plaintiff here, had an Administrative procedure). In reversing the dismissal, the U. S. Supreme Court said:

(Page 425):

“. . . The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by Administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow the results of which the regulations purport to control. . . .”

The U. S. District Court’s judgment of January 23, 1948, ordering the Long Beach Association restored to its elected officers has become final.

Can the losing appellants now, by Administrative hearing before themselves, appoint themselves in their guise as the Federal Savings and Loan Insurance Corporation, receivers of the Long Beach Association, and themselves thereby nullify the final judgment of a Federal Court?

An Administrative hearing before a litigant is not proper appellate procedure to vacate a final judgment of a Federal Court.

Citizens should be protected by the rudimentary requirements of fair play, even in their dealings with Administrative Agencies. (*Morgan v. U. S.*, 304 U. S. 1 at 15, 82 L. Ed. 1129 (1937).)

V.

INABILITY OF ADMINISTRATIVE PROCEDURE TO AFFORD RELIEF REQUIRED.

An administrative hearing held in Washington, D. C., is incapable of:

(1) Adjudicating the title to properties, both real and personal, located in California.

(2) Rendering a decree removing clouds from the title or enforcing encumbrances on real or personal property within California (an order of an administrative tribunal in Washington, D. C., would not discharge the *lis pendens* recorded in Los Angeles County).

(3) Ordering the judge to sign the checks, or requiring the Clerk to pay out, distribute or release the approximately \$14,000,000.00 of assets on deposit in the Registry of the U. S. District Court at Los Angeles.

An administrative tribunal in Washington, D. C., would not have jurisdiction over many of the parties, such as:

(1) The Title Service Company, a California corporation, holder of the legal title to the Southern California homes of approximately 8,000 borrowers,

(2) This plaintiff-appellee, Shareholder Members Protective Committee, nor the 16,000 shareholder owners, residents of Southern California, whose savings in the Long Beach Federal Savings and Loan Association are the *res*, the subject matter of the litigation,

(3) The non-resident Federal Home Loan Bank of Los Angeles and/or Portland and/or San Francisco, which ever exists, and which are "sue and be sued" corporations having their home offices in California.

They do business in California but not in Washington, D. C.

(4) The approximately 50 intervenors, title to whose approximately 400 parcels of real properties in Southern California were beclouded and encumbered by the actions of the defendant-appellants.

(5) Robert Wallis, who interplead, and claims, the \$50,000.00 cashier's check now in deposit in the Registry of the U. S. District Court,

(6) And many others, parties not subject to the control of the appellants.

In class actions, such as this, where the subject matter and primary parties are within the U. S. District Court's jurisdiction, all members of all classes concerned must be bound by the decree and, hence, if necessary, preliminary injunctions should issue to restrain all parties of all classes to such litigation from instituting or participating in the piecemeal trial of such equitable actions in any other forum. (*Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356, 65 L. Ed. 673 (1921).)

The obvious inability of an administrative tribunal sitting in Washington, D. C., more than 3,000 miles from the *situs* of the property, and having no jurisdiction over many of the parties primarily interested in the properties involved, is but the practical demonstration of the Rule that:

(Page 78):

"One trial of an issue is enough. The principles of res adjudicata apply to questions of jurisdiction as well as to other issues—as well to jurisdiction of the subject matter as of the parties."

Treinies v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85 (1940).

Only a Court having within its territorial jurisdiction the real and personal property involved in these two seizures can effectively adjudicate in one proceeding the rights and liabilities of all the parties interested in the properties seized and the multimillion dollar dealings therewith.

VI.

PRELIMINARY INJUNCTION—
DISCRETIONARY.

The issuance of a Preliminary Injunction rests in the sound discretion of the trial court, Deckert v. Independence Shares Corp., 311 U. S. 282, 85 L. Ed. 189 (1940).

In *Prendergast v. N. Y. Telephone Co.*, 262 U. S. 43, 67 L. Ed. 853 (1923), a Preliminary Injunction was issued prior to conclusion of an Administrative hearing before the Public Service Commission. There, like here, the appellants urged that; the Court lacked jurisdiction; the pleadings were insufficient; the action was premature, the Administrative remedies were not exhausted, and the injunction was not supported by the evidence. All of these contentions were overruled, and the U. S. Supreme Court stated:

(Page 51):

“It is well settled that *the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court*; and that, upon appeal, an Order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion.”
(Citing cases.) (Emphasis added.)

In *Munoz v. Porto Rico Ry. Light & Power Co.*, 83 F. 2d 262 (1936)—certiorari denied 298 U. S. 689, 80 L. Ed. 1408, the Appellate Court, in refusing to dissolve a Preliminary Injunction, stated:

(Page 268):

“It is a well established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an Or-

der either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised.”

* * * * *

“The Supreme Court generally disposes of appeals from interlocutory orders granting temporary injunctions by affirming upon the authority of cases, holding that the matter rests in the sound discretion of the trial court.” (Citing cases.) (Emphasis added.)

The U. S. District Court in which there has been more than 100 hearings which have resulted in more than ten final judgments during the past five years, did not abuse its discretion in issuing a Preliminary Injunction in aid of its jurisdiction, to protect its final judgments, to prevent another \$10,000,000.00 run, and to preserve the status quo, pending a trial on the merits.

CONCLUSION.

The U. S. District Court at Los Angeles had original jurisdiction of this action, brought by California residents to replevin local property and to remove all clouds to their title to such property. Such jurisdiction is founded upon several grounds:

First, the general jurisdiction of a local Court of Equity over local property *in rem* and *quasi in rem*.

Second, the Statutory jurisdiction specifically granted to the U. S. District Courts to quiet title to property within their jurisdiction (28 U. S. C. 1655).

Third, the general interpleader jurisdiction inherent in Courts of Equity, codified by Statutory provisions (28 U. S. C. 2361) and by F. R. C. P. (Rule 22).

Fourth, the jurisdiction over quiet title and replevin actions, such as this, and jurisdiction to review muniments of color of title, tendered by appellants as sole authority for exercising incidents of ownership over seized properties.

Fifth, the Administrative Procedure Act gives jurisdiction for judicial review of administrative orders (5 U. S. C. 1009.

Sixth, the inherent jurisdiction of courts to review unlawful administrative acts infringing upon personal rights.

Seventh, that it has become the Law of the Case and *res adjudicata* by virtue of the decisions of the U. S. Supreme Court and rulings of this 9th Circuit Court of Appeals in having denied leave to file Writs of Mandamus and/or Prohibition and/or Injunction and denied repeated applications for supersedeas, all of which upheld the attacked jurisdiction of the U. S. District Court.

Furthermore, it has become the Law of the Case and *res adjudicata*, by virtue of numerous final judgments, some by appeals dismissed and others by failure to appeal, but in all of which the jurisdiction of the U. S. District Court over both the subject matter and the parties has been recognized and accepted, either specifically or by implication, during the approximately five years of this litigation.

The U. S. District Court was not deprived of jurisdiction by the appellants' dilatory pleas, as

(1) the Sovereign is not a party and hence the Sovereign's immunity to suit is not involved,

(2) there are no indispensable parties in actions *in rem* or *quasi in rem*,

(3) these shareholders, as a class represented by this appellee, have no administrative remedies to exhaust—none were provided.

The proposed administrative tribunal (the Board) is a party defendant accused of fraud, and is incapable of impartially trying itself. It is, likewise, incapable of rendering appropriate relief as it does not have jurisdiction of either the *res* (property in California) nor of the parties (the California owners and claimants).

The U. S. District Court in exercise of, and to protect its jurisdiction, has power to, and should when necessary to preserve the *status quo* pending trial, and to prevent irreparable injury, enjoin all parties from instituting or participating in any proceeding other than that having jurisdiction over the property or *res* involved.

The issuance of a Preliminary Injunction to preserve the *status quo*, pending trial on the merits, rests in the sound discretion of the trial court, who may balance the equities to prevent irreparable injury.

The trial court did not abuse its discretion in protecting the financial reputation of the solvent Long Beach Association from the threat of a repetition of the \$10,000,000.00 run of 1946, by issuing this Preliminary Injunction in aid of the court's jurisdiction and to prevent a multiplicity of harassing actions.

The trial court (1) has jurisdiction, (2) the pleadings state a cause of action, (3) and the issuance of a Preliminary Injunction to protect the court's jurisdiction, to prevent the matter being heard piecemeal in a multiplicity of actions, to prevent the irreparable injury of another \$10,000,000.00 run, and to preserve the *status quo* pend-

ing the trial on the merits of the entire matter in one court *was not an abuse of discretion.*

Equity, once having acquired jurisdiction of a cause for any purpose, will retain and protect its jurisdiction for all purposes.

“EQUITY DOES NOT DO JUSTICE BY HALVES OR
PIECEMEAL.”

It is respectfully submitted that the Preliminary Injunction appealed from should be affirmed.

Respectfully submitted,

WESTOVER & SMITH,

By WYCKOFF WESTOVER,

Attorneys for the Plaintiffs-Appellees.

APPENDIX.

Exhibit A.



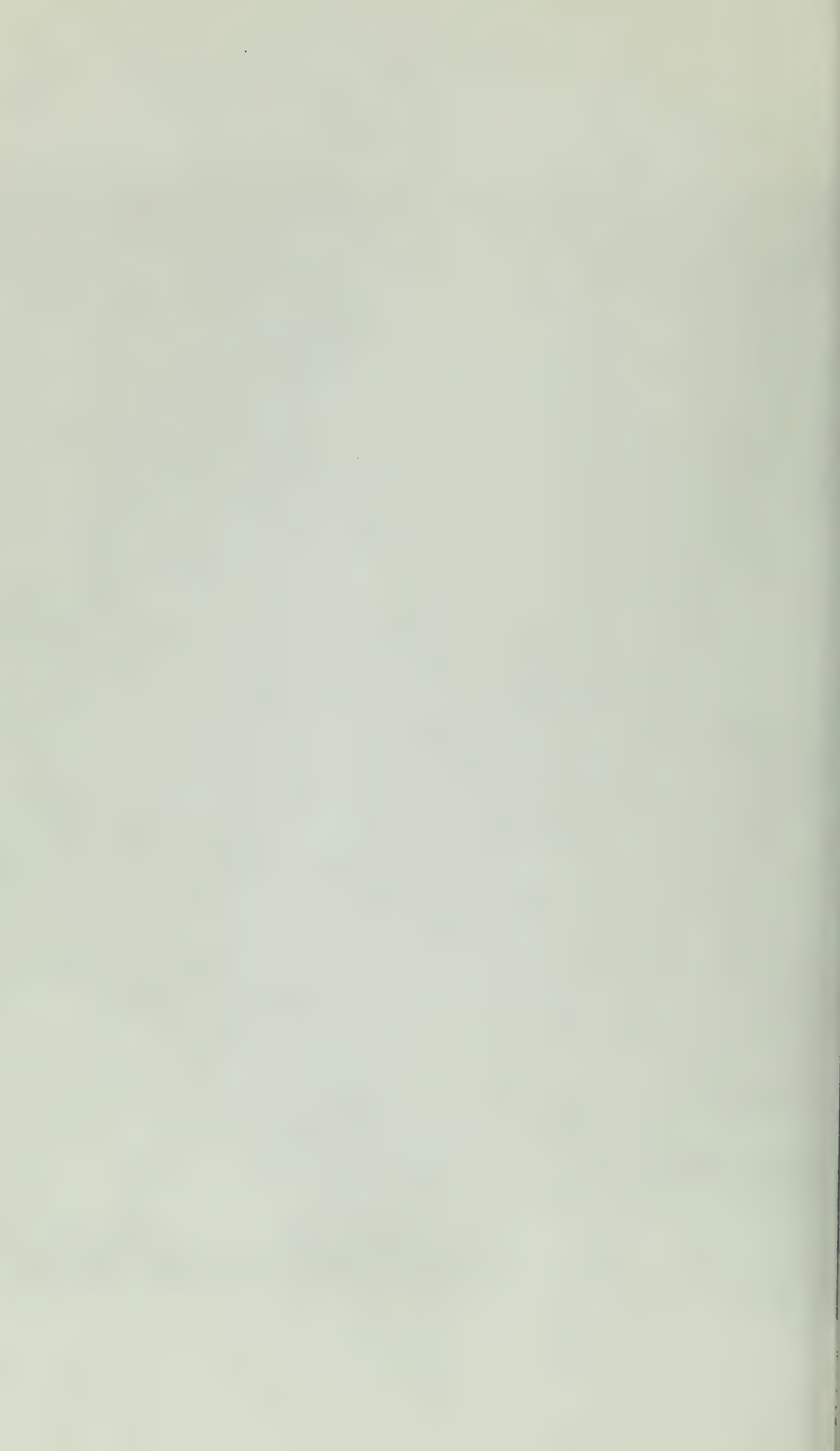
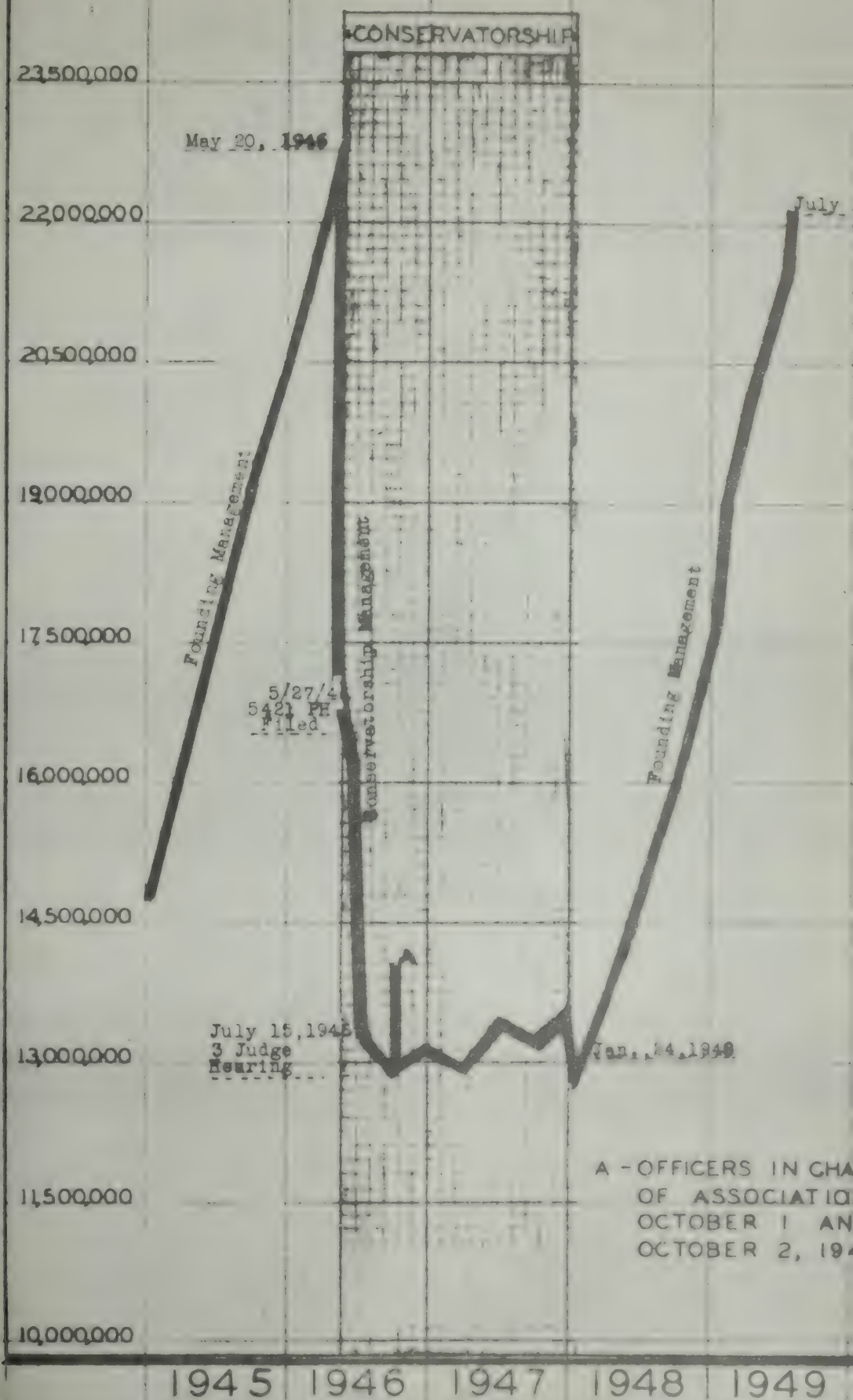


Exhibit B.



LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION
JANUARY 1, 1945 TO JULY 15, 1949

SHARE ACCOUNTS



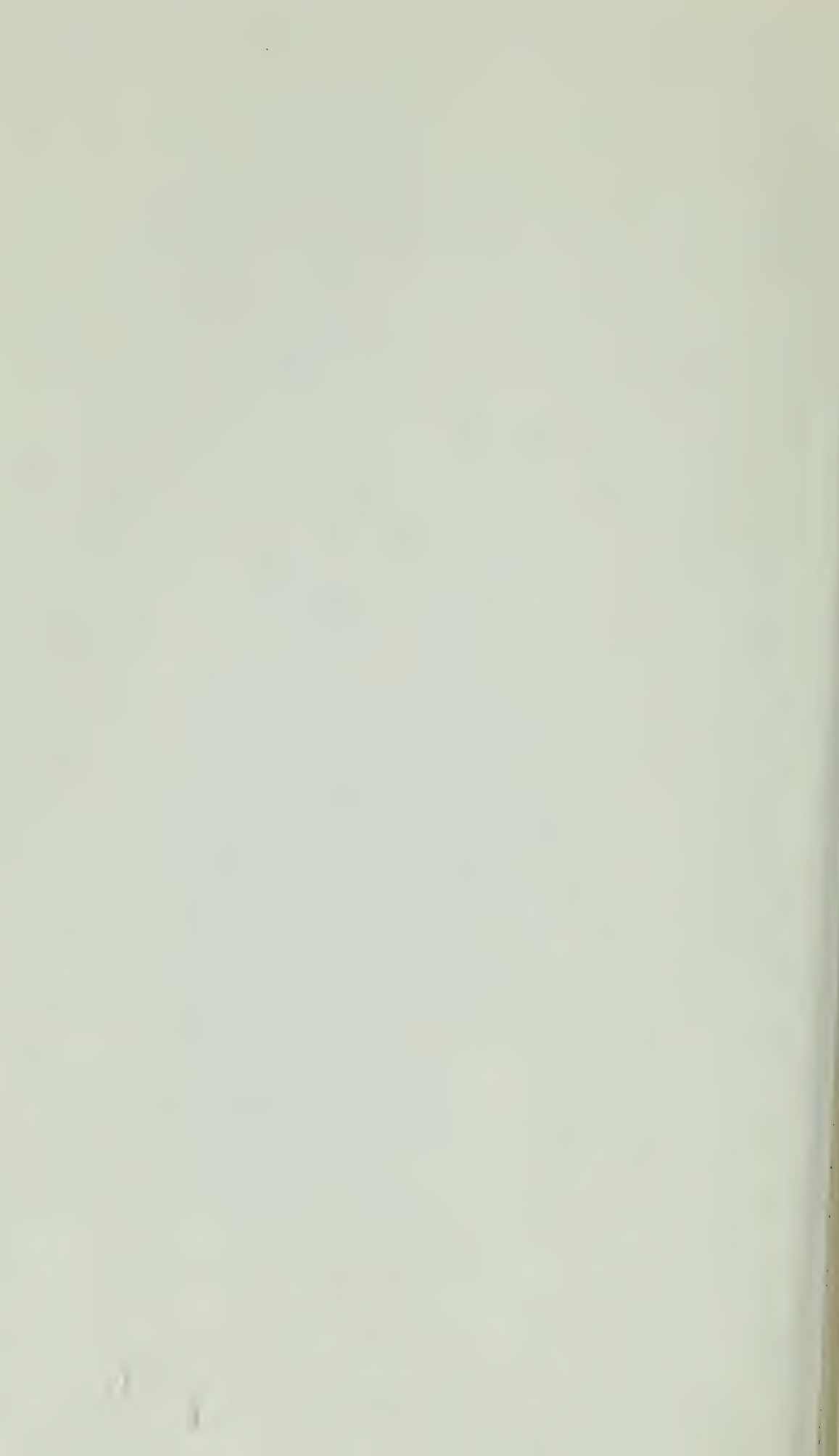


Exhibit D.

Civil Action No. 5421-P.H.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
FOR SUBSTITUTION OF PARTIES PLAINTIFF.**

The Plaintiffs, Flora E. Mallonee, Mabel E. Fergus and Winnie Bucklin, the presently constituted Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, in the above entitled class action, having filed on March 14, 1950 their Motion for Substitution of parties plaintiff, with supporting affidavits and points and authorities, and Notice of the time and place of hearing thereof, having been duly served upon counsel of record for all interested parties, and there having been no written objection filed to said motion, excepting only the opposition, filed by the defendants the Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann, and George K. Bramley, which opposition was joined in by the defendant Federal Home Loan Bank of San Francisco, and no others, the said Motion for Substitution of Parties Plaintiff, came on regularly for hearing in courtroom No. 1 in the Post Office and Federal Building at Los Angeles, on Monday, March 27, 1950, at the hour of 10 o'clock A. M., and there then and there appearing—

1. Wyckoff Westover, Esquire, of the firm of Westover & Smith, representing the plaintiffs, Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, and

2. Paul Fitting, Assistant United States Attorney, on behalf of Ernest A. Tolin, United States Attorney,

and William H. McKenna, Esquire, Assistant Counsel for the Home Loan Bank Board, representing the defendants, the Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann and George K. Bramley, and

3. Irving G. Bishop, Esquire, on behalf of Verne Dusenbery, Philip A. Angell, Irving G. Bishop and Sylvester Hoffman, Esquires, attorneys representing the defendant Federal Home Loan Bank of San Francisco, and

4. Charles K. Chapman, Esquire, representing the cross-complainant Long Beach Federal Savings and Loan Association;

And there having been presented no affidavits or oral or documentary evidence other than that submitted by the plaintiffs, and the matter having been argued and submitted, and the court being fully advised in the premises, Now Finds:

FINDINGS OF FACT.

1. That the plaintiffs herein Flora E. Mallonee, Mabel E. Fergus and Winnie Bucklin, are the presently duly and regularly licensed Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, (License No. 80282 LA, Receipt No. LA 69192, renewed January 1, 1950, issued pursuant to Chapter 385 of the Statutes of 1949 of the State of California, Department of Investment, Division of Corporations), and

2. That Notice of the hearing of said Motion for Substitution of parties plaintiff, was duly and regular given.

3. That this Court has heretofore after extended hearings, by various orders, held that it has jurisdiction of the parties and subject matter of the within litigation, from certain of which orders appeals were taken by the Home Loan Bank Board and/or its agents, and thereafter dismissed, and upon which order, as well as said other orders so holding, the time to appeal has passed for a considerable period.

4. That the above entitled class action was instituted on May 27, 1946 by Paul L. Mallonee, Winnie Bucklin, and C. H. Newhouse, for and on behalf of the shareholder members of the Long Beach Federal Savings and Loan Association, and

5. That said Paul L. Mallonee, Winnie Bucklin, and C. H. Newhouse were then a duly constituted Shareholder Members Protective Committee, and became duly licensed by the Department of Investment of the State of California, Division of Corporations, License No. 80282 LA.

6. That on May 19, 1948 C. H. Newhouse passed away in the City of Long Beach, County of Los Angeles, State of California.

7. That thereafter Mabel E. Fergus was duly substituted in the place and stead of C. H. Newhouse, deceased, to be a member of said Shareholder Members Protective Committee.

8. That on June 3, 1949, Paul L. Mallonee passed away in the City of Long Beach, County of Los Angeles, State of California.

9. That thereafter his widow, Flora E. Mallonee, was duly and regularly substituted in the place and stead of her husband, said Paul L. Mallonee, deceased, to be a member of said Shareholder Members Protective Committee.

10. That at all times since the commencement of this class action, the Shareholder Members Protective Committee has been duly and regularly constituted and has been the real plaintiff in the above entitled class action.

CONCLUSIONS OF LAW.

From the foregoing Findings of Fact the court now makes and renders its Conclusions of Law, that:

1. The above entitled class action did not abate by the death of said C. H. Newhouse, nor by the death of said Paul L. Mallonee, nor at all, but survives and continues as a class action for and on behalf of all of the shareholder members of the Long Beach Federal Savings and Loan Association, and as to all other issues and matters raised by the pleadings of the various parties.

2. That the motion for the substitution of Mabel E. Fergus in place and stead of C. H. Newhouse, deceased, and for the substitution of Flora E. Mallonee in place and stead of Paul L. Mallonee, deceased, should be granted.

JUDGMENT.

Wherefore, It Is Hereby Ordered, Adjudged And Decreed that the Motion of the plaintiffs Flora E. Mallonee, Mabel E. Fergus, and Winnie Bucklin, the presently constituted Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, to be substituted as plaintiffs in the above entitled action be and is hereby granted, and the said—

1. Mabel E. Fergus is substituted in place and stead of C. H. Newhouse, deceased, to be a plaintiff in the above entitled class action, and

2. Flora E. Mallonee is substituted in place and stead of Paul L. Mallonee, deceased, to be a plaintiff in the above entitled class action.

3. This Order of Substitution of parties plaintiffs is a final judgment and the court expressly determines that there is no just reason for delay and expressly directs and orders the forthwith entry of this judgment of substitution of parties plaintiff.

Dated at Los Angeles, this 5th day of April, 1950.

PEIRSON M. HALL,

Peirson M. Hall,

Judge of the United States District Court.

Entered April 5, 1950, Book 65, page 99.

[Clk. Tr. 19216.]

No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.* SHAREHOLDERS PROTECTIVE COMMITTEE
OF LONG BEACH ASSOCIATION, LONG BEACH FEDERAL
SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COM-
PANY, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY
et al.,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*

Appellees.

BRIEF OF APPELLEES, HOME OWNERS.

F. HENRY NeCASEK,

3233 East Anaheim Street, Long Beach 4, California,
Attorney for Home Investment Co., of Long Beach,
et al., Intervenors.

FILED

FEB 24 1951

PAUL P. O'BRIEN

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FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY
et al.,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*

Appellees.

BRIEF OF APPELLEES, HOME OWNERS.

PURPOSE OF BRIEF.

Appellee, Home Investment Co., of Long Beach, and other interveners (hereinafter sometimes referred to as "Home Owners"), are vitally interested in the pending appeal, inasmuch as it is an attempt to divest the District Court of jurisdiction and dismiss all proceedings heretofore had and done for lack of jurisdiction, thereby invalidating all prior orders of the court, many of which have become final, which would, to say the least, result in great confusion and entanglement of titles of Home Owners, particularly the titles to the numerous properties

which have heretofore been quieted and cleared through the more than fifty intervention proceedings.

The jurisdiction of the court in the *Mallonee* case and the *Los Angeles Bank* case, two independent actions, which have been consolidated in the District Court, has been attacked and if the contention of appellants is upheld, the entire litigation, including the numerous intervention actions and proceedings on behalf of the Home Owners, would be nullified, resulting in title entanglements, confusion, irreparable damage and absolute loss of faith in the lending institution and the courts.

It is for this reason that the Home Owners present this brief, even though they were not movants in the preliminary injunction proceedings.

JURISDICTIONAL STATEMENT.

Home Owner appellees, for the purpose of brevity, join in and adopt those portions of the brief of appellee, Long Beach Association, as to:

1. Description of litigation;
2. Jurisdictional statement;
3. Statement of the case;
4. Scope of review of appeal from preliminary injunction;
5. Immunity from suit;
6. Indispensable parties;
7. Conclusiveness of findings;
8. Propriety of preliminary injunction.

Additional treatment as to the jurisdiction of the court in this case, will be found in the Statement of the Case and the Argument, hereinafter set forth.

STATEMENT OF THE CASE.

Appellee Home Investment Co. of Long Beach first appeared in the court proceedings on July 1, 1946 [R. 257] as an intervener to secure an order of the District Court, quieting title and to secure reconveyances of 174 deeds of trust, involving approximately \$800,000.00 which had theretofore been interplead by answer and cross-claim in interpleader [R. 43] and deposited in the Registry of the District Court, by appellee Title Service Company (Defendant in the *Mallonee* action), as the trustee named in said 174 deeds of trust. Appellee Title Service Company had been named as trustee in deeds of trust, affecting 8,000 borrowers of which appellee Long Beach Federal Savings and Loan Association was named as beneficiary, and the aggregate balances upon said deeds of trust was approximately \$12,000,000.00 [R. 44].

Appellee Home Investment Co. of Long Beach filed with the District Court its petition [R. 270] and motion for leave to intervene [R. 259], which motion was granted by the court.

The complaint of appellee Home Investment Co. of Long Beach [R. 260] sets forth in substance the following facts:

The intervener is the borrower named in the 174 deeds of trust on deposit in the Registry of the Court and the record owner of the real property affected by said deeds of trust; that appellee Title Service Company was the trustee thereunder; that appellee Long Beach Federal Savings and Loan Association was the beneficiary.

That intervener had carried on negotiations with the appellee Association to pay the loans in full but before

the refinancing could be completed, appellant conservator Ammann had taken possession of the Long Beach Association and thereafter intervenor was unable to obtain the necessary reconveyances; that intervenor would suffer great and irreparable loss; that intervenor would be adversely affected by the distribution or other disposition of the property in the custody of the court, and that the court had jurisdiction by reason of diversity of citizenship, and the interpretation and effect of laws and regulations, to-wit:

1. Home Owners Loan Act of 1933;
2. Federal Home Loan Bank Act, as amended;
3. The National Housing Act—Public No. 479;
4. Regulations, rules and directives purportedly made and adopted pursuant to and under each and all of said acts;
5. Judicial Code, Title 28, Sec. 41(26).

The prayer for relief asked for an order against all parties in interest to show cause why payments should not be accepted through the court and reconveyances issued. The complaint also asked for damages, reasonable attorneys' fees and court costs.

Based on said petition to intervene, the court entered an order to show cause directed to all plaintiffs and defendants and specified the manner of service [R. 280].

Separate answers were filed by appellees Mallonee, *et al.*, Long Beach Federal Savings and Loan Association and Title Service Company, to the complaint in intervention of Home Investment Co. of Long Beach [R. 411-424]. Appellants never answered or denied any of the complaints in intervention.

Following a hearing on the order to show cause. the court on July 12, 1946, entered an order, directing the execution of 174 trust deed reconveyances, specifying the manner of payment, and defining the rights of the parties [R. 523].

The order, among other things, directed Title Service Company to deposit 174 reconveyances in duplicate with the clerk of the court and ordered the clerk to deliver the original copies to appellee Home Investment Co., of Long Beach, upon payment of \$774,927.90, plus accruing interest.

The order further provided:

“That upon payment of the aforesaid amounts to the Clerk of this Court, the said Clerk shall forthwith deposit said sums of money in the registry of this Court, and said amounts shall remain on deposit in the registry until the further order of this Court, and the rights heretofore existing of each and every party to this action, except as to the Intervener Home Investment Co. of Long Beach, a corporation, its successors or assigns, be and the same are hereby expressly reserved and preserved without prejudice and shall be enforced against said sums of deposited money to all intents and purposes as though said reconveyances had not been executed and delivered pursuant to this Order.” [R. 527.]

Said order [R. 528] further provided:

“That this Court reserves jurisdiction of this matter so as to enable it to make such other and further orders in the premises to carry out the terms, conditions and provisions of this Order, and for the allowance of attorneys fees and costs, if any, and otherwise.”

No appeal was ever filed to this Order and it has become final.

Subsequent to the filing of the complaint in intervention of appellee Home Investment Co., of Long Beach, there were filed during the years 1946, 1947 and 1948, approximately fifty independent intervention actions, affecting 400 parcels of real property, and approximately \$1,500,000.00 was deposited in the registry of the court pursuant to said orders. [R. 8288-8293.] Except for the fact that in most instances the trust deeds and notes had not theretofore been interplead in court prior to the filing of the motion to intervene, all said intervention actions followed the same general pattern of procedure during the entire period of the conservatorship. It was only by following such plan that the Home Owners were able to secure merchantable titles, insurable by title companies in Southern California.

The intervener Home Owners and their grantees have relied upon the numerous judgments in interpleader (intervention) of the District Court and to now uphold the contention of appellants that the entire proceedings in the District Court be dismissed for lack of jurisdiction, would result in chaos and irreparable damage, which is one of the many reasons why the preliminary injunction now under attack was granted by the District Court and should be affirmed [R. 8271].

It is inconceivable how the appellants at this late date would dare attempt to undermine the public confidence, not only insofar as it pertains to financial institutions over which they exercise some supervision, but also in the federal judicial system.

The District Court has pending before it many matters affecting titles to Home Owners, among them being the following:

- (a) The assignment of the Home Owners notes to the San Francisco Bank.
- (b) The dispute as to the existence of the San Francisco Bank.
- (c) The loan of \$6,300,000.00 of the seized Los Angeles Bank assets.
- (d) The restraining order against appellant Ammann transferring the appellee Association's assets to the San Francisco Bank.
- (e) The final determination of the right of the parties of the money and properties deposited in the Registry of the Court pursuant to the various orders in intervention and interpleader, all of which have become final.

Appellee Home Owners contend that it is imperative that such matters be determined by the court having jurisdiction, that is, the District Court in Southern California.

The conclusiveness of the judgments in intervention obtained in 1946, 1947 and 1948 cannot now be attacked or denied by appellants. During the year 1947, appeals were taken by appellants [R. 3152-3153] from four judgments [R. 2393-2398, 2519-2524, 2561-2565, 3136-3141], which said appeals were later dismissed [R. 3976-3978].

QUESTIONS INVOLVED.

Appellants set forth the presented questions at pages 21 and 22 of their brief. Appellee Home Owners present the following additional questions:

1. Are the judgments in intervention affecting and quieting titles of numerous Home Owners (interveners herein) final so they cannot be affected by this appeal?

2. Was the preliminary injunction necessary to protect the titles of the Home Owners quieted by previous orders of the District Court, from further confusion and entanglements?

3. To whom are the Home Owners to look for relief in the future should the contention of the appellants be upheld and the consolidated actions in the District Court be dismissed?

THE ANSWER TO QUESTION (1) OF THE HOME OWNERS MUST BE IN THE AFFIRMATIVE.

All litigation must end at some stage of the proceedings. In the case of *Stoll v. Gottlieb*, 205 U. S. 165, 83 L. Ed. 104, it was held that a court must have power to determine whether or not it has jurisdiction of the person of a litigant or whether his geographical jurisdiction covers the place of the occurrence under consideration, and it further held that it is just as important there should be a place to end as there should be a place to begin litigation.

In the case of *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 84 L. Ed. 85, the Supreme Court in affirming the Court of Appeals for the Ninth Circuit held that one trial of an issue is enough and that the principles of *res*

judicata applied to questions of jurisdiction as well as to other issues.

Reference is also made to the following authorities:

American Surety Company v. Baldwin, 287 U. S. 156, 77 L. Ed. 231;

Baldwin v. Iowa Travelling Men, etc., 283 U. S. 522, 75 L. Ed. 1244.

THE ANSWER TO QUESTION (2) OF THE HOME OWNERS SHOULD ALSO BE IN THE AFFIRMATIVE.

The Order 2015 calling for administrative hearing [R. 8242-8247] is an attempt to appoint a receiver for appellee Long Beach Federal Savings and Loan Association, who would succeed to all its rights in and to all moneys and property interplead into the Registry of the District Court, and the removal and taking possession thereof would in fact nullify the claims of the parties thereto as specifically reserved in the numerous intervention orders [R. 527].

The courts in the past have jealously guarded their rights to prevent interference with orders quieting title to property.

Order 2015 to show cause why receivers should not be appointed for appellee Long Beach Federal Savings and Loan Association is an attempt to circumvent the orders and judgments of the District Court.

Appellee Home Owners in support of their contention cite in detail the case of *Dugas v. American Surety Co.*, 300 U. S. 414, 81 L. Ed. 720.

The above case was an interpleader action wherein Surety Company deposited total amount of bond in the U. S. Court, which entered judgment thereon determining liability of the surety company to plaintiff. The judgment enjoined any other state or federal court actions against the interpleading company. Defendant brought another action in the state court against another and different surety company on a different bond which nevertheless related to the same transaction, and upon which the interpleading surety company would eventually be liable for payment. The interpleading surety company filed a supplemental bill in its original interpleader action, setting forth the indirect method attempted by defendant, to evade the prior interpleader decree, and referring to the earlier judgment and injunction in interpleader of the court.

The court under its interpleader jurisdiction, promptly enjoined any further prosecution of the new state court action. Plaintiff took this appeal to the Supreme Court challenging the jurisdiction of the District Court and particularly its power to enjoin proceedings against non-parties to the original interpleader action.

The District Court found that the new state court action against a different defendant was "in contravention of the spirit if not the letter of the decree in the interpleader suit."

The United States Supreme Court affirmed the injunction and said (quoting the interpleader statute):

"Sec. 2. . . . Notwithstanding any provision of the Judicial Code to the contrary, said court shall have power to issue its process for all such claimants

and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any other Federal Court . . . on such bond . . . until the further order of the court; which process and order of injunction shall be returnable at such time as the said court or a judge thereof shall determine and shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found.”

“Sec. 3. Said court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as may be suitable and proper, and issue all such customary writs as may be necessary or convenient to carry out and enforce the same. . . .”

“Plainly the court had jurisdiction of both the subject matter and the parties. No appeal was taken from either decree. Therefore Dugas was bound by both decrees. . . . But these rulings were all made in the exercise of the court’s jurisdiction, were subject to challenge and re-examination only on appeal, and became conclusive on him in the absence of an appeal.” (Emphasis added.)

“Sec. 5. The jurisdiction to entertain the supplemental bill is free from doubt. Such a bill may be brought in a Federal Court in aid of and to effectuate its prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect, but subject to the qualification that the relief be not of a different kind or on a different principle. Such a bill is ancillary and dependent, and

therefore the jurisdiction follows that of the original suit, regardless of the citizenship of the parties to the bill or the amount in controversy.

“6. The power of the court to enjoin Dugas from further prosecuting his suit in the state court on the appeal bond has full support in §§ 2 and 3, of the Interpleader Act of 1926 before quoted, as also in settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees.”

The Court at pages 726 and 727 said:

“In the interpleader suit there was an actual, complete and judicially sanctioned payment. . . . While the payment was into the court’s registry, and not directly to the claimants, it nevertheless was a lawful and effective payment under the Interpleader Act. In effect the first decree converted the claims under the bond into claims against the fund paid into the registry; . . .”

In the case of *City of Orangeburg v. Southern Railroad Co.*, 134 F. 2d 890 (C. C. A. 4), the court held:

“ . . . the court . . . may enjoin the parties from proceeding in any other court when the effect of the action therein would be to defeat or to impair its own jurisdiction. . . .”

The court also held in the case of *Julian v. Central Trust Company*, 193 U. S. 629, 48 L. Ed. 629, that where the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may restrain all proceedings which would have the effect of defeating or impairing its jurisdiction.

THE ANSWER TO QUESTION (3) OF THE HOME OWNERS MUST ALSO BE ANSWERED IN THE AFFIRMATIVE.

At the outset of the intervention proceedings, title insurance companies in Southern California were reluctant to insure titles obtained by the Home Owners under the procedure outlined in the statement of the case (*supra*), and it was only after many long conferences, the reliance on the fact that the money representing the deeds of trust and the rights of the parties thereto was preserved in the numerous court orders, and the persuasion of the court [R. 10165] that the Home Owners were able to obtain title policies.

The District Court upon an intervention hearing, made the following comments regarding the title situation [R. 10165]:

“Mr. NeCasek: Let us both go up and talk to the Title Insurance Company.

The Court: I am serious about giving consideration to the matter of making the title company a party to the action. You have 8000 parcels of property, you say, that are involved. We already have, I do not know how many interventions already in here, 200 or 300 parcels of property involved in this, and if custom is not a showing, I do not know what else is. You just cannot sell a piece of property here, it is not merchantable, to anybody except on the successor basis who will buy things without looking.

Mr. NeCasek: There are hundreds of escrows being held up, titles in jeopardy here all over the country, all over Southern California, on account of this situation. I get calls every day from people wanting to know if they can get some relief. I have

given the matter considerable thought and consulted with the title company and they feel that they want a good foundation laid to have a good reason why they can back up their position by going ahead and issuing them without exception.”

This Honorable Ninth Circuit Court is well aware of the title situation in California, that is, titles are not ordinarily merchantable unless the buyer or lender is furnished a policy of title insurance.

Appellee Home Owners again strenuously urge the upholding of the District Court’s jurisdiction and refer again to the chaotic condition which would again prevail in the event of the holding that the District Court lacked jurisdiction to make and enter the numerous orders in interpleader and intervention, quieting title to approximately 400 parcels of real property.

THE QUESTION RAISED IN APPELLANTS’ BRIEF AS TO INDISPENSABLE PARTIES HAS NO MERIT.

Appellants’ contention that by reason of the fact that they are a governmental agency or members thereof, and therefore their actions are beyond the review of any court, or that they are immune from suit, is beyond comprehension. It is conceded that the Federal Home Loan Bank of San Francisco and the Federal Savings and Loan Insurance Corporation are both “sue or be sued” corporations. It is also conceded that under regulation C. F. R. 24, Section 149.5 which defines the powers and duties of a conservator that such conservator may sue or be sued.

In the cases of *Land v. Dollar*, 330 U. S. 731, 91 L. Ed. 1209; *Keifer v. Reconstruction Finance*, 306 U. S. 381, 83 L. Ed. 785; *Federal Housing Administration v. Burr*, 309

U. S. 242, 84 L. Ed. 724, and *Reconstruction Finance Corp. v. Menihan*, 312 U. S. 81, 85 L. Ed. 595, it is specifically held that the doctrine of immunity of Federal agencies is not favored by Congress or the courts.

The contention of the Home Owners is that if any immunity ever did exist, it was waived and abandoned by the general appearance of appellant Home Loan Bank Board and its members when they filed in the District Court a certified copy of Resolution 388 [R. 3404], which by its terms removed the conservator, appellant Ammann, under court order.

The attitude of Congress towards agencies' immunity from suit is expressed in Section 10(c) of the Administrative Procedure Act, Title 5 U. S. C. A., Sec. 1009, which provides that every agency action made reviewable by statute, and every final agency action from which there is no other adequate remedy in any court, shall be subject to judicial review. It would therefore appear that if there is no other adequate remedy for judicial review, the Administrative Procedure Act creates one.

In the case of *Reconstruction Finance Corporation v. Menihan* (*supra*), the court held:

“ . . . that waivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities—that being in line with the current disfavor of the doctrine of governmental immunity—we conclude that in the absence of a contrary showing ‘it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with the authority to ‘sue or be sued’ that agency is not less amenable to judicial process than a private enterprise under like circumstances one would be’”

Appellee Ammann, as conservator, was the agent of the indispensable parties and he actively participated in all the intervention proceedings by filing schedules revealing to the court the amount necessary to repay the numerous loans [R. 405] and by full compliance with the court's orders in depositing documents and funds in the Registry of the Court as directed by said orders.

ON THE QUESTION OF OUT OF STATE SERVICE
AND PROPRIETY OF THE INJUNCTION TO RE-
STRAIN THE HOLDING OF THE ADMINISTRA-
TIVE HEARING, THE INTERPLEADER JURISDIC-
TION OF THE DISTRICT COURT IS A COMPLETE
ANSWER.

The right of Home Owners to intervene and interplead in order to avoid double liability and multiplicity of actions is affirmed in the decision of *Treinies v. Sunshine Mining Company*, 308 U. S. 66, 84 L. Ed. 85 (*supra*). This case holds that one trial of an issue is sufficient and that the principles of *res judicata* apply to questions of jurisdiction as well as to other issues. Prior to the District Court assuming jurisdiction of the above case, actions had been instituted in the state courts of Washington and Idaho, which resulted in conflicting judgments over the ownership of stock in the Sunshine Mining Company. Subsequently, the mining company filed an interpleader action in the District Court in Idaho and secured an injunction against further proceedings in the state courts. In deciding the case, the U. S. Supreme Court said:

“By the Act of January 20, 1936, (Old Title 28 U. S. C. A., Sec. 41, Subd. 26) the district courts have jurisdiction of suits in equity, interpleading two or more adverse claimants, instituted by complainants

who have property of the requisite value claimed by citizens of different states. The suit may be maintained 'although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another'."

Appellants questioned the power of a Federal Court in Idaho to enjoin proceedings by a receiver in the State of Washington, before the Washington state courts. In upholding such power in the Idaho Federal Court, the Supreme Court said:

"Process may run at least throughout all the states.

"Neither are the provisions of Sec. 265 of the Judicial Code, 28 U. S. C. A. 379 applicable. That section forbids a United States court from staying proceedings in any state court. The Interpleader Act, passed subsequently, however, authorizes the enjoining of parties to the interpleader from further prosecuting any suit in any state or United States court on account of the property involved. Such authority is essential to the protection of the interpleader jurisdiction and is a valid exercise of the judicial power." (Emphasis added.)

The parties to the appeal attempted to re-litigate the jurisdiction of the state courts which had made final judgments determining such question of jurisdiction. In refusing to permit re-litigation of jurisdiction when the judgments of the state court had become final, the Supreme Court said:

"One trial of an issue is enough. The principles of *res judicata* apply to questions of jurisdiction as

well as to other issues, as well to jurisdiction of the subject matter as of the parties. (Citing authorities.)” (Emphasis added.)

Railway Express Co. v. Jones, 106 F. 2d 341 (C. C. A. 7—1939);

Rosetti v. Hill, 162 F. 2d 892 (C. C. A. 9—1947);

Security Bank v. Walsh, 91 F. 2d 481 (C. C. A. 9—1937);

Dugas v. American Surety Co., 300 U. S. 414, 81 L. Ed. 720 (1937).

In the case of *Cramer v. Phoenix, etc.*, 91 F. 2d 141 (C. C. A. 8, 1937), the court in affirming interpleader jurisdiction held that it is elementary that when one court takes jurisdiction of a specific thing, the *res* is as much withdrawn from the judicial power of another court as if removed to a different territorial sovereignty. The court further held that the tribunal whose jurisdiction first attaches, holds it to the exclusion of all others.

In the case of *Maryland Casualty Co. v. Glassell-Taylor, etc.*, 156 F. 2d 519 (C. C. A. 5, 1946), the court held that the Federal Rules of Civil Procedure were not designed merely to prevent a multiplicity of suits and protect the stakeholder from multiple liability, that they were also intended to require all interested parties to come in and set up their claims in one case. It further held that the interpleader statute was also designed to afford a means of process by which claimants to a fund who live in other jurisdictions, may be called in and required to litigate in one court to the end that all claimants to the fund, as

well as the holder of the fund, may be given ample protection.

United States v. Sentinel Fire Insurance Co., 178 F. 2d 217 (U. S. Court of Appeals, 5th Circuit—1949);

Rule 22 F. R. C. P., Secs. 1335, 1397 and 2361 (former 41 (26)) of Title 28 U. S. Code.

In rem jurisdiction has been established pursuant to Section 1655 (formerly Sec. 118), Title 28 U. S. Code. The District Court has jurisdiction pursuant to orders heretofore made and not appealed from, shown in Exhibits "A", "D", "E", "F" and "H", commencing at R. 8310 and ending at R. 8398.

Looney v. East Texas R. R. Co., 247 U. S. 214, 62 L. Ed. 1084 (1918);

Julian v. Central Trust Co., 193 U. S. 629, 48 L. Ed. 629 (1904).

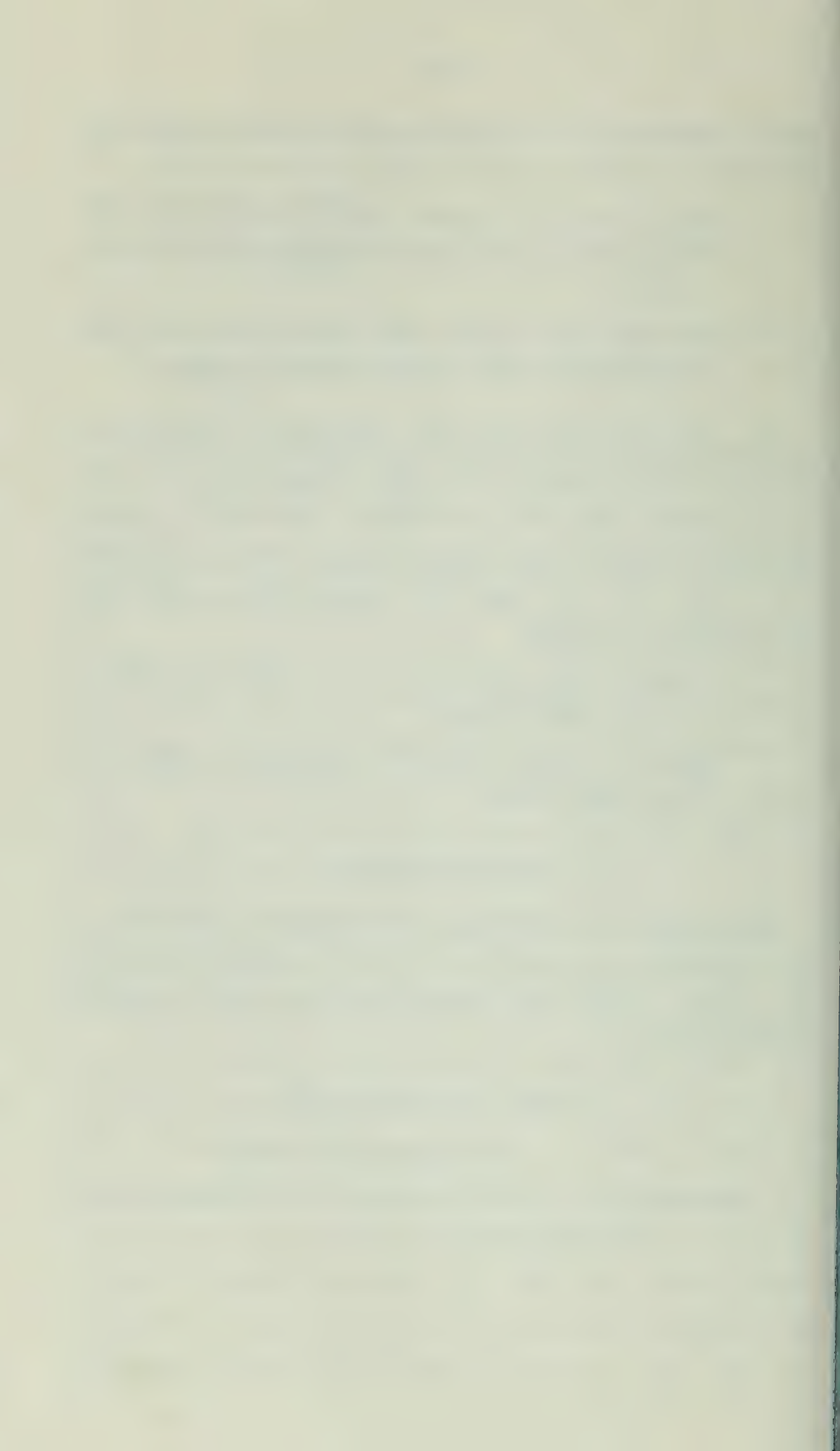
CONCLUSION.

The attack of appellants, collaterally or otherwise, of the jurisdiction of the District Court is without merit and the appeal should be dismissed and the order appealed from affirmed.

Respectfully submitted,

F. HENRY NECASEK,

*Attorney for Home Investment Co., of Long Beach,
et al., Intervenors.*



No. 12511

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, SHAREHOLDERS PROTECTIVE COMMITTEE
OF LONG BEACH ASSOCIATION, LONG BEACH FEDERAL
SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COM-
PANY, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY
et al.,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

BRIEF OF APPELLEE, TITLE SERVICE
COMPANY.

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Appellees.

BRIEF OF APPELLEE, TITLE SERVICE COMPANY.

PRELIMINARY STATEMENT.

Because of the volume of the 11,000 page printed record, which discloses a part only of the five years of this litigation through the U. S. Supreme Court, Ninth Circuit Court of Appeals, several U. S. District Courts, Califor-

nia State Superior Court, and Congressional Investigations, this appellee, Title Service Company, and other appellees have joined in consolidating various portions of their briefs.

This appellee joins in portions of the brief of appellee Long Beach Federal Savings and Loan Association as to:

1. Description of the litigation;
2. Jurisdictional Statement;
3. Statement of the Case;
4. Scope of Review on Appeal from Preliminary Injunction;
5. The Court has Jurisdiction (entire Section);
6. Appellants are Not Immune from Suit;
7. There are No Indispensable Parties;
8. Findings of the Court are Conclusive;
9. Preliminary Injunction was Proper (entire Section);

This appellee's brief will contain sections with similar headings supplementing said matters so they particularly apply to this appellee only.

SUPPLEMENTARY STATEMENT OF THE CASE.

This appellee, Title Service Company, was (and is) trustee in several thousands of deeds of trust, with an aggregate value of approximately \$12,000,000.00. [R. 47]. Each of said deeds of trust conveyed a separate parcel of real property (usually the home of the borrower) to this appellee as trustee, to secure the repayment of a loan made by appellee, Long Beach Association.

Appellee's duty as trustee was to reconvey the property to the owner upon payment in full to whomever was legally entitled to receive the balance due on the loan. Determination of who was entitled to receive the balance on the loan became a complicated legal problem upon appellant Ammann's seizure of appellee Long Beach Association, and assignment of said seized notes and deeds of trust to appellant San Francisco Bank, in consideration for payment to Ammann by San Francisco Bank of \$7,300,000.00 of seized Los Angeles Bank assets. [R. 3708.]

Appellee Title Service Company became a party to this litigation when it was sued on May 27, 1946, by original plaintiffs Mallonee, *et al.*, Shareholders Protective Committee of appellee Long Beach Association. In its answer to such complaint, it filed its cross-claim in interpleader and in the nature of interpleader, pursuant to express statutory authority in Title 28, Section 41(26) U. S. C. A. (1946 version), now in Title 28, Sections 1335, 1397 and 2361. [R. 43-56.] By such interpleader, it deposited into the Registry of the Court below, \$800,000.00 in face

value, of notes and deeds of trust, which conveyed legal title to this appellee as trustee on 174 separate homes.¹

In addition, as such trustee, this appellee interplead into Court, the legal title to several thousand additional homes upon which it was trustee. The original notes and deeds of trust concerned had been seized by appellant Ammann as part of the assets of appellee Long Beach Association.

Appellee Title Service Company as trustee, sought instructions of the Court below as to how it could discharge its duties as trustee. [R. 54.] It could not comply with the request and demand for reconveyance of one party to the litigation, made in defiance of the stop orders and cross-demands of other parties; particularly in view of the fact that the notes bore assignments and cancellations of assignments, by rubber stamp, undated and unauthenticated, and, as to the cancellations, completely unsigned.

The only reconveyances by Title Service Company since being made a defendant in the litigation, have been made either:

(a) pursuant to order of Court and deposited with the Clerk of the Court, or

(b) pursuant to orders or judgments of the Court, quieting title in said appellee Association as beneficiary under said deeds of trust.

¹Reference is made to the entire section on "Interpleader Jurisdiction" in brief of appellee Long Beach Association, wherein the exact details of Title Service Company interpleader and fifty (50) supplementary interpleaders resulting therefrom, together with the findings of the Court in orders made thereon, are all set forth in complete detail. Reference is also made to the authorities and statutes on interpleader cited in said section of said brief.

Who among the litigants is entitled to receive payment of the \$12,000,000.00 balance due on thousands of notes and deeds of trust is one of the many issues yet to be decided by the Court below. The litigants' claims to receive payment of the \$12,000,000.00 of deeds of trust have been removed from the deeds of trust and the thousands of homes and placed upon the \$14,000,000.00 in assets in the Registry of the Court. [R. 8526-8537.] Except for such removal and transfer of those claims, titles to the homes would yet be clouded and encumbered. As one of the principal interpleaders, this appellee, together with other appellees, has joined in seeking and obtaining from the Court below preliminary injunctions to prevent a multiplicity of litigation over these issues. [R. 7659-7676.] Such issues particularly apply to this appellee's duties as trustee.

Appellees Los Angeles Bank and appellants Portland Bank and San Francisco Bank, assert claims of ownership dependent upon and arising from, appellant Ammann's assignments and transfers of the thousands of notes. This appellee's homeowners desired to pay upon their loans on their homes, but required assurance that such payment was effective to discharge their debts and **particularly that such payment would result in insurable titles.**

Payment by the homeowners to any one of the claimant litigants to the exclusion of the others did not result in insurable title. Title companies were unwilling to insure in advance of final judgment, the probable outcome of litigation involving the constitutionality of Acts of Congress. One of the Congressional Acts was unanimously held unconstitutional by a statutory Three-Judge Court and unanimously held constitutional by the U. S. Supreme Court, neither of which decisions was conclusive or final

as to the eventual determination of ownership of the \$12,000,000.00 to be paid under the deeds of trust.

This appellee took active part in conferences with title insurance companies' counsel and committees, and other counsel in the litigation, to evolve the process of deposit into the Registry of the Court of the total amount due upon the notes secured by the deeds of trust, together with reconveyances, requests for reconveyances, and deposit of the original note and deed of trust, for cancellation by the Clerk of the Court. As a result, titles, insurable by reputable title insurance companies were available to the homeowners throughout the litigation, including pendency of the appeals to the U. S. Supreme Court, writs, remands and other proceedings.

It was necessary however, for the distressed homeowners to obtain their own separate counsel and to intervene as parties in the litigation. [R. 8288-8293, Ftn. 15.] In many instances, appellant Ammann, well knowing he was unable to give an insurable title, had collected payment in full from the borrowers. Ammann sought to incite such borrowers against appellee Title Service Company because it, as trustee, refused to act without authority of the Court in which it was a defendant and into whose registry it had interplead the legal title.

The Court required appellant Ammann to deposit in Court, the amounts he had thus collected, upon which deposit, the borrowers finally obtained the release and reconveyance of their homes, which they believed had been released, when they paid appellant Ammann.

Appellee Title Service Company, by steadfastly observing the Court's instructions and orders for reconveyances, and declining to proceed without such Court orders, incurred the enmity of appellants and their allies. In

January of 1948, this appellee was sued among other defendants for \$2,000,000.00 in damages by two of the 16,000 depositors in appellee Long Beach Association. The damages alleged were part of the claims of mismanagement made by appellants as part of the first seizure of Long Beach Association in May of 1946.

This appellee, as trustee, is vitally concerned in the attacks upon the jurisdiction of the Court below to clear the homeowners' titles by the deposit in Court.

QUESTIONS PRESENTED.

Several questions are presented insofar as Title Service Company, the trustee, appellee, is concerned:

1. Whether the appellants can attack the jurisdiction of the District Court several years after judgments in interpleader affecting the homeowners' titles have become final following dismissal of appeals from said judgments.

2. Whether the judgments in interpleader, whereby the thousands of homeowners received merchantable and insurable titles, are final and not subject to this appeal.

3. Whether the District Court has the power by injunction to protect its judgments whereby the titles of thousands of innocent homeowners have been made merchantable and insurable.

4. Whether appellants by an administrative hearing can interfere with the jurisdiction and final judgments of the District Court.

5. Whether Title Service Company, a California corporation, holding title as trustee to thousands of homes within the Southern California area, should submit the vital issue of title to those homes to an independent and impartial Federal Court or to an "administrative hearing" 3,000 miles away conducted by appellants themselves.

ARGUMENT.

I.

Jurisdiction of the District Court in Interpleader Was Decided Forever by Its Former Judgments.

Regardless of technicalities or niceties of dilatory pleas, as abused by appellants, there must somewhere and sometime be, an end to litigation as to the jurisdiction of a Court to clear titles for thousands of distressed homeowners.

In *Stoll v. Gottlieb*, 205 U. S. 165, 83 L. Ed. 104 (1938), the Supreme Court said:

“ . . . a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. . . . It is just as important that there should be a place to end as that there should be a place to begin litigation. . . . ”

In *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 84 L. Ed. 85 (1940), in affirming this Court of Appeals for the Ninth Circuit, the Supreme Court said:

“One trial of an issue is enough,. The principles of *res judicata* apply to questions of jurisdiction as well as to other issues, AS WELL TO JURISDICTION OF THE SUBJECT MATTERS AS OF THE PARTIES.” (Emphasis added.)

Many prior decisions of the Supreme and other Courts are quoted as authority for this statement. See also:

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231 (1932);

Baldwin v. Iowa Traveling Men, etc., 283 U. S. 522, 75 L. Ed. 1244 (1931).

A United States District Court, making an order in interpleader requiring adverse claimants to litigate their claims as to funds or property deposited in the Registry of that Court, thereby relieves and discharges from further liability all those who have paid or delivered money or property into the Court for eventual payment to the winning litigant.

Title Insurance Companies throughout Southern California, have relied upon this interpleader jurisdiction of the Court below and insured the validity of titles thus quieted and cleared by such final judgments of the Court.

Homeowners have relied upon such interpleader jurisdiction of the Court below and have paid into the Registry of the Court, or to the appellee Long Beach Association in whom the Court quieted title, millions of dollars of notes and deeds of trust, the subject of conflicting claims and disputes in this litigation.

Innocent purchasers have acquired the titles of such homeowners in reliance upon the final judgments in interpleader of the Court below.

Real estate values have increased tremendously since the first interpleaders in the early stages of this litigation. Many properties have been sold at greatly advanced values and many loans have been made by innocent lenders and financial institutions upon the homes of the borrowers thus cleared by the final judgments of the Court below.

Denial of jurisdiction of the Court will undo everything accomplished in the clearing of such titles. It will undermine public confidence, not only in the appellee Long Beach Association, but in all federal institutions, and particularly in the federal judicial system. A borrower, who has cleared title to his home by judgment of a Federal Court,

final for several years, upon finding himself again plunged into litigation which has already continued for five years and been the subject of fifteen Court proceedings would be particularly terrified. Especially is this true as to borrowers of modest means as are the majority of the homeowners here involved.

The record discloses [R. 8423-8518 also 8288-8292] that most of the thousands of loans were for from \$3,000.00 to \$7,000.00 in amount.

An individual homeowner who has already paid attorneys' fees in 1946 or 1947 to clear the title entanglements caused by seizures of Federal Home Loan Banks and Federal Savings and Loan Associations, has a right to rely on the finality of such judgment discharging him from such litigation and to rely upon the rule of *res judicata*, that the titles thus quieted were finally and permanently settled as to this litigation. Appellants, in 1948, dismissed their prior appeals to this Honorable Court of Appeals. During 1946, 1947 and 1948, they allowed other similar judgments to become final by reason of the expiration of time for appeal therefrom.

Appellants' resolution, filed in January, 1948, with the District Court, removing Appellant Ammann as conservator, resulted in a final judgment which quieted the Association's title against appellant Ammann. [R. 3404.] Those dealing with the Association subsequent to that time, relied upon the finality of that judgment caused by appellees' own act.

Federal Court judgments, final for years, should not be subject to nullification at the whim of the defendants against whom the judgments were entered.

The expenses of this litigation, removed from the borrowers' homes by orders of the Court below in 1946, 1947 and 1948, should not again become a crushing burden upon such homes and titles because appellants have become dissatisfied with the judgments from which they took no appeal within the time allowed by law.

If jurisdiction in the Court below be denied after five years of litigation, this appellee must either await the filing of individual quiet title actions by each of the thousands of borrowers separately, or as trustee, this appellee must itself institute such actions in whatever Courts may appear to have the jurisdiction thus denied to the Federal Court within whose district the real property involved is physically located.

The insurability of titles obtained through such new litigation, prior to final judgment, is highly improbable. Title Insurance companies, who have insured title based upon final judgments of a Federal Court, upon finding five years later that they must pay on the policies because of their belief in the finality of such judgments, would be most unlikely to insure new proceedings in any other Court. They certainly would not insure judgments against administrative officials if those officials are to have the power to vacate such judgments at will, upon the calling of an Administrative Hearing.

II.

The Preliminary Injunction Protected the Judgments of the District Court Quieting Title.

Appellants by ordering cause to be shown why a receiver should not be appointed to liquidate appellee Long Beach Federal Savings and Loan Association, set up proceedings to cancel the judgments of the Court, which required deposit of millions of dollars in the Registry of the Court in interpleader. Withdrawal by such receiver of such money, would nullify removal of the claims by the earlier quiet title judgments from the thousands of homes and placed upon the assets in Court. Power of the Court to issue a Preliminary Injunction to prevent interference with a party in whom the Court had quieted title, is upheld by the following cases:

Dugas v. American Surety Co., 300 U. S. 414, 81 L. Ed. 720 (1936).

In describing an injunction to prevent further litigation in other Courts, the Supreme Court said:

“The power of the court to enjoin . . . has full support in . . . the Interpleader Act . . . as also in settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees.” (Referring to many other cases.)

In *City of Orangeburg v. Southern Railroad Co.*, 134 F. 2d 890 (C. C. A. 4, 1943), the Court said:

“. . . the court . . . may enjoin the parties from proceeding in any other court when the effect of the action therein would be to defeat or to impair its own jurisdiction. . . .”

In *Julian v. Central Trust Company*, 193 U. S. 93, 48 L. Ed. 629 (1904), it was said:

“ . . . where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may . . . restrain all proceedings, . . . which would have the effect of defeating or impairing its jurisdiction. . . . ”

The Court below, in its final judgments, expressly reserved authority to make further orders to protect the titles it quieted in the homeowners. The Preliminary Injunction in this appeal, was an order made under such reserved jurisdiction.

This appellee has continued to reconvey during the pendency of the present appeals, in reliance upon the finality of the judgments quieting title in the Court below, particularly relying upon denial or writs of prohibition in 1947 by the U. S. Supreme Court and in June of 1950, by this Honorable Court of Appeals. Reconveyances in reliance upon such final judgments quieting title are being insured by reputable title companies, notwithstanding the present appeals.

This appellee is informed that such continuing title insurance is based upon the deposit in the Registry of the Court of the approximately \$14,000,000.00 in assets which have been in such Registry for approximately three years since 1948. Withdrawal of such deposit from the Registry of the Court prior to final decision would render the titles uninsurable again.

None of the ten prior and present appeals and writs have resulted in any appellate Court ruling, questioning the jurisdiction of the Court below *in rem* over the assets in its Registry or over the real property physically within its territorial jurisdiction.

Such continuing reconveyances are substantial in number and average several hundred per year. Appellee is informed other trustees are likewise reconveying in reliance upon such final judgments quieting title and the title insurance issued thereupon by reputable title insurance companies.

This appellee urgently presses upon the attention of this Honorable Court of Appeals, the disastrous consequences which would immediately fall upon the innocent homeowners and borrowers if jurisdiction of the Court below to make such final judgments quieting title be voided or vacated, years after the time for appeal from such judgments has expired.

If jurisdiction of the Court below be denied, thousands of such reconveyances, issued by this appellee in reliance upon final judgments of the Court below, quieting appellee Long Beach Association's title in such notes and deeds of trust, would be voided. The titles thus cleared by such reconveyances and final judgments would by such denial of jurisdiction, again be clouded. Further, if jurisdiction of the Court below be denied, this appellee will face several thousand separate actions by individual borrowers seeking determination of which of all the litigant claimants, can safely be paid.

Payment to any one claimant to the exclusion of the other claimants, cannot be expected to result in an effective discharge. The parties defendant to the several thousand resulting quiet title actions, will be the same parties who have been litigants before this Court for approximately five years.

This appellee is unable to find any benefit resulting to the public welfare from re-clouding the titles of the inno-

cent homeowners and spreading this litigation into several thousand separate lawsuits.

By the express terms of the various deeds of trust, the expenses of such litigation and the attorneys' fees of this appellee, and all counsel for claimants, beneficiaries under said deeds of trust, will fall upon the homes of the innocent borrowers.

Pursuant to orders made by the District Court following successive interventions and deposits in Court, during the first two years of this litigation, all of which orders have become final, the obligation for such litigation expenses, including attorneys' fees, **was transferred from the homes of the borrowers to the money deposited in the Registry of the Court.**

The voiding of these orders on the ground of lack of jurisdiction of the Court below, would appear to cause the very substantial litigation expenses already accrued, estimated at from \$300,000.00 to \$500,000.00 and the enormous expenses which would result from several thousand additional Court proceedings, to again fall upon the homes of the borrowers, from which homes such expenses have been removed by judgments of the Court below, final for several years.

Interpleader jurisdiction was designed to prevent exactly such multiplicity and duplication of litigation and proceedings.

This appellee, through its officers and attorneys, has had direct personal contact with many of the distressed homeowners. Appellees' original attorney, H. O. Wallace, died in Washington, D. C., in 1948, during strenuous efforts to clear the titles to thousands of homes, clouded by the appellants' seizures.

The distress of the homeowner who pays in full to a federal official and then discovers he has not obtained a clear title, is pitiful. When, however, the homeowner discovers that the federal official knew, when he took payment in full, that the title would remain clouded notwithstanding such payment, the distress of the homeowner changes to a sense of outrage against his own Government.

Washington officials have become calloused to the deprivation imposed upon salaried or working persons required to employ and pay their own separate attorneys to participate in litigation as expensive and protracted as that disclosed by this 11,500 page printed record.

Many homeowners, unable to afford separate counsel, waited through the twenty months before the removal of appellant Ammann as conservator, and only obtained a clear title to their homes upon the mass interpleader of some \$14,000,000.00 *by the Association* within a few weeks after it was restored.

The District Court utilized the interpleader jurisdiction first invoked by this appellee, Title Service Company, and by such jurisdiction, succeeded in lifting this burden from the homeowners. It should not again be allowed to fall upon and crush them.

Some borrowers entangled in other machinations of appellants which caused a snarl of liens, judgments, attachments, executions, and other process, are yet awaiting relief from the Court below because the matter of their individual transactions was not disclosed in the records of appellant Ammann as conservator, and they were therefore omitted from the mass interpleader which referred by individual legal descriptions to each of the separate

parcels of property to which title was cleared. Such descriptions cover 95 printed pages [8423 to 8518] of the printed record.

The omnibus clauses clearing titles not therein specifically described, was insufficient to clear some of these particularly tangled matters.

The Federal Court, within whose territory the real property is situated, and within whose registry the \$14,000,000.00 in assets are on deposit, is the Court specifically authorized by Acts of Congress to have jurisdiction in interpleader, whose process extends, as was said in *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 84 L. Ed. 85 (1940), "at least throughout all the states."

If the District Court is held, three years after its judgments become final, to have been without jurisdiction to clear the titles tangled by the five year old seizures of the Los Angeles Bank and the Long Beach Association and the two years of appellants' assignments and dealings with the seized assets, it is extremely unlikely that any State Court can ever effectively exercise remedial jurisdiction. Certainly, marketable, insurable titles, cannot result for many years.

This appellee is confident that these dire results will not occur, but this appellee, during the course of this litigation, witnessed the issuance of a few policies of title insurance which purported to insure the borrowers of the non-existence of deeds of trust which yet remained of record, unreconveyed on the records of the County Recorder's office. Said title insurance also failed to disclose the pendency of this litigation. The borrowers, thus deceived, were quickly in the Court below when they discovered the unmarketability of their titles. The title

insurance company, so insuring, issued only a few (about four) such policies and was itself made a defendant in the litigation.

The exact “arrangements” of appellants by which title insurance was procured showing titles as clear from a deed of trust unreconveyed of record, and showing the property as clear of the *lis pendens* specifically describing that property and referring to this pending litigation, is one of the subjects which will be thoroughly inquired into, on the trial on the merits in the Court below.

III.

The Enjoined Administrative Hearing Would Have Interfered With Jurisdiction and Final Judgments of the District Court.

Every trustee under a deed of trust, as used in California, is trustee both for the borrower and for the lender. The borrower conveys legal title to his real estate to the trustee in trust, such legal title to be returned to the borrower if and when the loan is paid in full. If the borrower defaults, the trustee by appropriate sale proceedings, conveys the legal title to, or for the benefit of, the lender. The trustee, when asked to reconvey, has the legal duty of determining that the request for reconveyance is made by undisputed owner of the loan.

In the present case, appellee Title Service Company, is such trustee on several thousand deeds of trust for approximately 8,000 borrowers and is likewise trustee for whomsoever the Court decides is to receive the \$12,000.000.00 in loans secured by such deeds of trust.

Confronted with the conflicting claims of these litigants, Title Service Company, as such trustee, interplead

such title into the Court. This interpleader resulted in final judgments and reconveyances based thereon, which effectively cleared the homeowners' titles. By such judgments, the claims of the litigation were transferred from the deeds of trust and the titles of the homes, to the money and assets deposited in the Registry of the Court.

Acting upon such final judgments of the Federal Court, appellee Title Service Company, as trustee, was, every month, reconveying numerous titles (totalling several hundred a year). Appellants, years after such judgments quieting title became final, issued their Order No. 2015, requiring that the appellee Long Beach Association [R. 8242]:

“ . . . appear at a hearing, as hereinafter provided, and show cause, if any it have, why the Home Loan Bank Board, should not . . . enter its order . . . for the appointment of the Federal Savings and Loan Insurance Corporation as receiver for said Association; . . . ”

“ . . . And It Is Further Ordered that any person, partnership, association, or corporation claiming to have an interest in the subject matter involved may, at any time before the closing of the hearing, file with the Presiding Officer a petition for leave to intervene at said hearing. . . . ”

Appellee Title Service Company, as appellants well know, claimed to have an interest in the subject matter involved. Its interest was that of trustee on \$12,000,-000.00 of deeds of trust, interplead into the custody of the Court.

Appointment of a receiver would remove the title and ownership from appellee Long Beach Association in whom it had been quieted by the Court below and transfer it to

appellant Federal Savings and Loan Insurance Corporation and Home Loan Bank Board, against whom the Court below had quieted such title.

Appellee Title Service Company, as trustee for the 8,000 homeowner borrowers, and for the lenders, had the choice of either defaulting such hearing or of applying to appellants for leave to intervene. If it defaulted the hearing, appellants would appoint themselves as receiver to take from appellee Long Beach Association the titles which the Federal Court had quieted in such Association and thereby immediately *create a conflict between the orders of the Home Loan Bank Board and the judgments of the Federal Court.* If on the other hand, appellee Title Service Company applied to appellants for leave to intervene, and if appellants granted such petition for intervention, appellee Title Service Company would then appear before appellants and submit to them the questions of how appellee Title Service Company was to discharge its duties as trustee. These questions, appellee Title Service Company had previously submitted to the Federal Court in June of 1946, and had in 1946, 1947 and 1948 received final judgments, instructing it as to reconveyances and further disposition of the titles thus interplead into the Federal Court.

A lis pendens had been recorded in 1946 notifying the world that the trustee under the deeds of trust had conveyed such title to the Federal Court for instructions and directions.

If appellee Title Service Company as trustee, defaulted the Administrative Hearing, it could be held liable by the borrowers for a breach of its trustee duties in permitting the titles to their homes to again be clouded by the de-

feated litigants against whom the Federal Court had quieted such title.

If it took the other alternative and appeared before appellants Home Loan Bank Board and submitted to appellants (for their own decision) the issues $3\frac{1}{2}$ years previously submitted to the Federal Court for decision, it could do so only by attempting to withdraw from the Federal Court and submit to defendants for their own decision, issues already decided, or yet to be decided by such Federal Court, but only by an order of the Federal Court authorizing such withdrawal of issues, could the legal title to the thousands of homes be validly conveyed.

The Court found [R. 8268]:

“53. That the proposed order for hearing, if given its face effect, is an attempted withdrawal by one of the parties to this litigation, from this court, of many of, if not the major issues involved, and an effort to act upon those issues in its own behalf, without regard to the jurisdiction of this Court or the contentions of the many parties to this litigation who are not parties to such order.”

[R. 8269.] “55. That the proceedings ordered by said Home Loan Bank Board Order No. 2015, if permitted to be held as threatened, threatens to result in the appointment of the members of said Board, in their capacity as managing trustees of defendant Federal Savings and Loan Insurance Corporation, a receiver, for their adversary cross-claimant Long Beach Federal Savings and Loan Association, in which event a question would, or may, arise as to whether or not a party to this litigation would thereby have made, or attempted to make, decision and dis-

position of the ownership, title, possession and control of, some or all of said assets, aggregating approximately \$14,000,000.00 interplead into the Registry of this Court as aforesaid, as well as some or all of the other issues involved in this litigation, without regard to the jurisdiction of this Court or the rights of the many parties litigant herein.”

[R. 8271.] “57. That the hearings ordered by said Home Loan Bank Board’s Order No. 2015, interfere with the jurisdiction of this Court and would constitute a duplication of actions and a multiplicity of suits, hearings and proceedings for the decision, hearing and determination of questions, issues and controversies, previously presented to, and either previously decided, or now pending for decision and determination before this Court, in the said cases and matters above captioned. That a multiplicity and duplication of proceedings, suits, hearings and litigation, would cause great, irreparable, immediate and continuing loss, injury and damage, to the parties litigant in these actions now pending before this Court.”

[R. 8263.] “47. That the said Home Loan Bank Board Order No. 2015 (see Footnote No. 11) threatens, by all of the charges therein contained in numbers 1 to 3 inclusive (and by number 4 inclusive, insofar as any reference is made to alleged violations set out in the so-called ‘More Definite Statement’ submitted to said Association on May 29, 1946) to impose upon, interfere with and supplant the jurisdiction of this Court to determine some or all of the main issues in the entire litigation, as well as some or all of the hereinbefore mentioned preliminary issues. That all of said matters and things herein referred to, are inextricably involved in some or all of the numerous matters and things which are pres-

ently pending before this Court, and which are either now directly or indirectly in issue between some or all of the multitudinous parties to this litigation, or have been in issue in some or all of the numerous matters, motions and proceedings heretofore had, upon which final appealable orders have been made by this Court, and as to many of which, the time for appeal has long expired, and as to one of which orders, an appeal was taken and dismissed, and from another group of said orders, an appeal was taken and dismissed. . . .”

Only the Federal Court can make valid adjudications of title. No act of appellant Home Loan Bank Board, whether an Administrative Hearing or otherwise, can, unless the Federal Court concurs in the action, effectively transfer titles quieted by Federal Court judgment in one of the litigants. However, any such order appointing a receiver or otherwise affecting the titles, does create a conflict between the orders of appellants Home Loan Bank Board, a defeated litigant and the final judgments of the Federal Court in which that litigant was defeated. Such conflict casts a cloud upon the titles involved.

Appellee Title Service Company, as trustee for the thousands of homeowners, could not stand idly by until the homeowners' titles were again clouded. Having three years previously invoked the interpleader jurisdiction of Federal Courts to prevent multiplicity of actions and vexatious hearings and trials, appellee Title Service Company's trustee duties required it to prevent at the earliest possible moment, a recurrence of the tribulations of the innocent homeowners whose only fault in this litigation was borrowing money from an Association later seized by appellants and restored by final judgment of the Federal Court.

IV.

The Preliminary Injunction Prevented a Vexatious Multiplicity of Actions and Hearings.

Appellants' Order No. 2015 [R. 8242] by its terms required "any person, partnership, association or corporation, claiming to have an interest in the subject matter involved . . ." to "petition for leave to intervene at said hearing. . . ." Such order, so far as this appellee was able to ascertain, was never published in the Federal Register as required by law. Appellee homeowners would therefore have had no way of knowing of the hearing to be conducted 3,000 miles away in Washington, D. C., and which would vitally affect their rights by again clouding the titles to their homes.

Had this appellee, Title Service Company, petitioned for, and been granted, leave to intervene, at said administrative hearing, it would thereby, without the knowledge or consent, have submitted the questions of the homeowners' rights to the administrative hearing. Such rights had previously been submitted by this appellee in 1946 to the Federal Court at Los Angeles and such submission had resulted in fifty or more separate interventions by distressed homeowners as parties in the litigation in the Federal Court. [R. 8288 to 8293.] Withdrawal from the Federal Court of the issues adjudicated on such fifty interventions was impossible.

Withdrawal from the Federal Court of the issues previously submitted in 1946 was likewise impossible without notice to all of the thousands of homeowners concerned. The mere giving of such a notice of intention to withdraw from the Federal Court and submit to the administrative hearing, issues pending before the Court since 1946 demonstrates its impossibility.

Giving of such notice alone would be sufficient to provoke another run of withdrawals similar to the \$10,000,000.00 run which occurred when appellant Ammann first seized the Association in 1946. It is extremely unlikely that any of the homeowners whose titles were already cleared by final judgments of the Federal Court would knowingly consent to the trustee withdrawing the titles to their homes from the Federal Court only to submit them to the administrative hearing before appellants. For a trustee who had invoked the interpleader jurisdiction of a Federal Court to repudiate that Court and its jurisdiction was unthinkable and for such trustee to be threatened with the penalties of a default at the administrative hearing for refusal to withdraw from the Federal Court and its jurisdiction, issues previously decided by final judgments of that Federal Court was a direct contempt of the Court, its jurisdiction and its judgments by those who made such threats.

This appellee, Title Service Company, was trustee not only for the borrowers and the titles to their homes but for the lender the beneficiary entitled to receive the \$12,000,000.00 secured by the deeds of trust. Before appellant Ammann seized the Association, the named beneficiary was the appellee Association.

Immediately after the seizure, appellees, Mallonee, *et al.*, the Shareholders Protective Committee, represented the 16,000 depositors, the real owners of the right to receive the \$12,000,000.00 due on the trust deeds. The Shareholders Protective Committee, who brought the litigation in 1946, as plaintiffs, *had also moved to enjoin appellants' administrative hearing.* The motion was upon the grounds, among others, of interference with the jurisdiction and judgments of the District Court. Without the consent of the beneficiaries named in the deeds

of trust, this appellee, Title Service Company, would have been liable for any loss resulting had it attempted to withdraw from the Federal Court and submit to appellants Home Loan Bank Board, the issues of the litigation before Federal Court.

This appellee, as a party had obtained previous injunctions issued by the District Court when other parties to the litigation attempted to split the litigation into sections and cause it to be prosecuted simultaneously in several different courts.

In July of 1948, a preliminary injunction was issued preventing appellants San Francisco Bank and its officers and directors from litigating in the Northern District Court at San Francisco the issues which had then been proceeding for more than two years before the Los Angeles District Court.

Another similar preliminary injunction was issued February 2, 1949, to prevent the litigation in the California State Superior Court of issues which had been then proceeding for nearly three years before the District Court at Los Angeles.

No appeal had ever been taken from either of these preliminary injunctions. None of the parties to the litigation who had recovered judgments in the District Court would voluntarily submit to the simultaneous litigation of the remaining issues before appellants so-called "administrative hearing" 3,000 miles distant.

The hearing before appellants was objectionable not only as a multiplicity and duplication of actions and proceedings, but particularly as an attempt by one litigant to try his own case in his own Court before himself. Such efforts usually result from those swollen with the abuse of power. At page 311 of Senate Document 248,

79th Congress, Legislative History, Administrative Procedure Act, Honorable Pat McCarran, Chairman of the Senate Judiciary Committee, says:

“Mr. McCarran. Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.”

and on page 351, as part of the report of Honorable Francis E. Walter, Chairman of Subcommittee No. 3, Committee on the Judiciary of the House of Representatives of said Senate Document No. 248, is stated:

“. . . On the eve of the American Revolution the great Pitt warned that ‘unlimited power corrupts the possessor.’ Our Declaration of Independence, which followed a few years later, charged that the British King had ‘sent hither swarms of officers to harass our people,’ sponsored ‘arbitrary government,’ sought to introduce ‘absolute rule into these Colonies,’ and proposed to alter ‘fundamentally the forms of our governments.’ Those were the words of Thomas Jefferson, used to describe the administrative tyranny of the time.”

Sometimes, it is a labor leader who refuses to abide by a judgment of the Court. Such an instance was

U. S. A. v. United Mine Workers, John L. Lewis, et al., 330 U. S. 258, 91 L. Ed. 884 (1947).

In the opinion, Justice Frankfurter at page 307 of U. S. said:

“The historic phrase ‘a government of laws and not of men’ epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He

was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. . . . So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judged in his own case. That is what courts are for. And no type of controversy is more peculiarly fit for judicial determination than a controversy that calls into question the power of a court to decide. Controversies over 'jurisdiction' are apt to raise difficult technical problems. They usually involve judicial presuppositions, textual doubts, confused legislative history, and like factors hardly fit for final determination by the self-interest of a party.

“. . . Whether a defendant may be brought to the bar of justice is not for the defendant himself to decide. . . .

“. . . The most prized liberties themselves presuppose an independent judiciary through which these liberties may be, as they often have been, vindicated. When in a real controversy, such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy. . . .

“. . . There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself

what is law, every man can. That means first chaos, then tyranny. . . . The greater the power that defies law the less tolerant can this Court be of defiance. . . . ”

Appellants Home Loan Bank Board ignore the language of this opinion. They seek to act as a Court of Appeals and reverse and set aside final judgments of the District Court *against* themselves.

Title Service Company is a California corporation. Whatever may be the obligations of federal savings and loan associations or federal home loan banks, there can be no requirement that Title Service Company, a California corporation, trustee, holding as trustee, title to several thousand California homes must withdraw such title from the Federal Court into which the title had been interplead, and at the demand of appellant Home Loan Bank Board, submit the issues of the litigation as to such titles to appellant Home Loan Bank Board at Washington, D. C., 3,000 miles distant, for the Home Loan Bank Board's decision in favor of itself.

Appellant Home Loan Bank Board has no authority to issue summons, order to show cause, or other process compelling this appellee Title Service Company to submit its trustee duties and obligations to the Home Loan Bank Board for decision.

Appellant Home Loan Bank Board by threats to decide the litigation against appellee Title Service Company, unless this appellee intervenes, deprive the Federal Court of its jurisdiction, and thereby deprive this appellee Title Service Company of its constitutional rights to a fair trial by an impartial tribunal.

The whole nation would be horrified and scandalized if a federal judge personally a defendant in damage claims

totaling \$20,000,000.00, summoned the plaintiffs to a trial before such judge to decide such damage claims. Yet, that is exactly what appellants Home Loan Bank Board have done by their order for “administrative hearing,” and exactly what they will do if they succeed in reversing the preliminary injunction which is the only obstacle presently preventing them from trying their own case before themselves.

If the federal judge, in our imaginary case, not only summoned the plaintiffs to submit to him for decision their \$20,000,000.00 damage claims against such judge personally, but also announced he was about to appoint himself receiver to prosecute the damage claims against himself, we would have the exact parallel of what the Home Loan Bank Board has been enjoined from doing by the preliminary injunction, which they ask this Court of Appeals to reverse.

The high standards of impartiality required from judges have equal application to tribunals exercising the power of courts. The appointment of a receiver is the exercise of the judicial function. Abuses such as those enjoined are exactly what brought about the remedial legislation known as the Administrative Procedure Act. The preliminary injunction subject to this appeal was specifically authorized by the precise terms of such act. Section 10(d) (1009 U. S. C. A. Title 25).

This appellee Title Service Company, as trustee for the thousands of homeowners, believes that its trustee duty required submitting the vital issue of the titles of such homeowners only to an independent and impartial Federal Court, and that its trustee duties prevented any of the litigants withdrawal of the issues from the Federal Court for decisions by one of the litigants at a hearing before themselves.

The only result that such hearing could achieve is a conflict between the orders of appellant Home Loan Bank Board and the judgments of the Federal Court, to the immediate and irreparable damage of the homeowners whose titles were thus clouded.

CONCLUSION.

The preliminary injunction should be affirmed. The District Court was authorized under its interpleader jurisdiction and otherwise to protect the parties who had received its final judgments quieting their title. Thousands of homeowners in Southern California should not be required to travel 3,000 miles to Washington, D. C., to submit to a multiplicity and duplication of hearings on issues for several years submitted to and partially decided by the District Court.

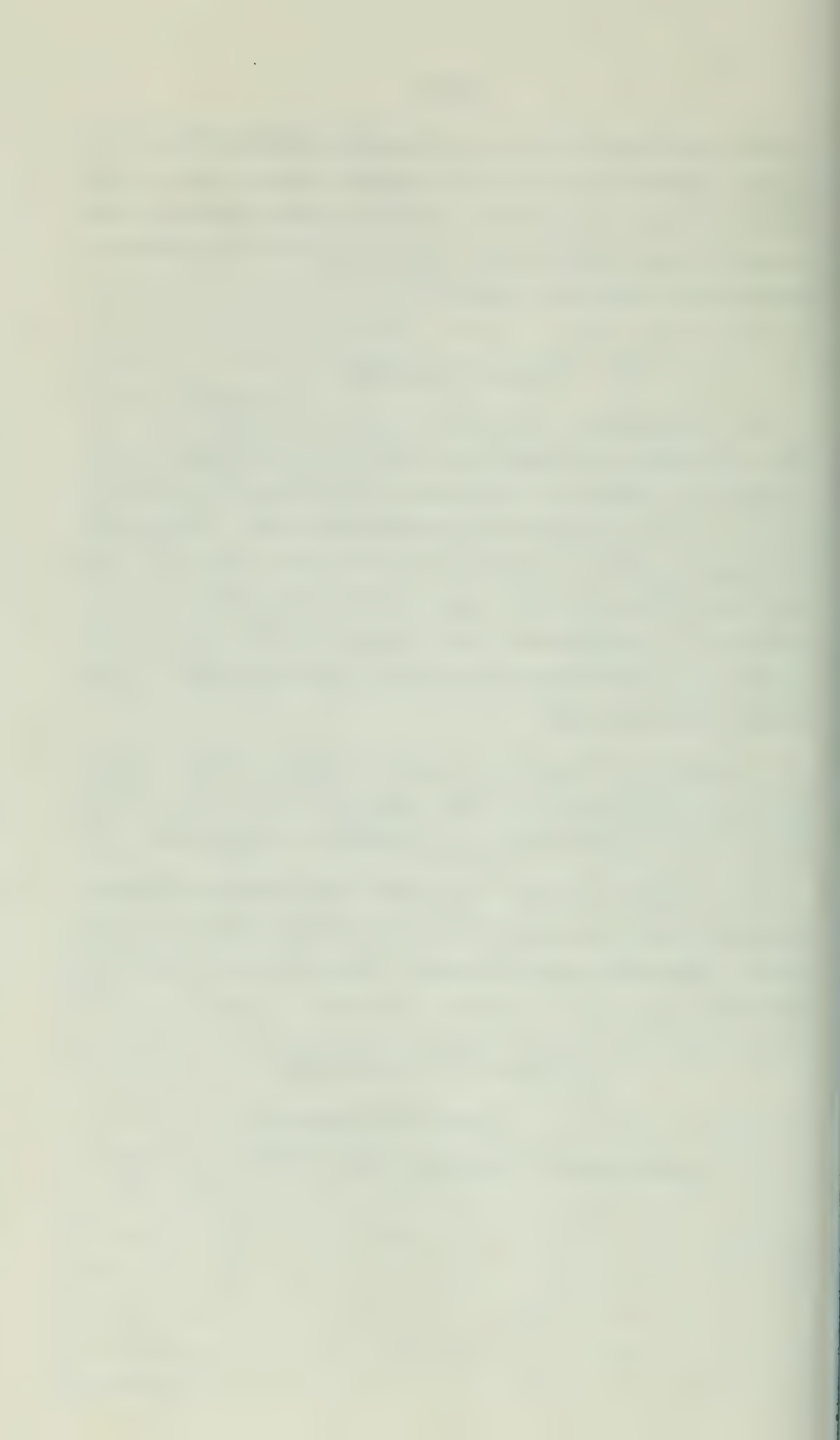
Coercion by threats of default against parties whose titles are protected by final judgments of the Federal Court can be prevented by a preliminary injunction.

The preliminary injunction should be affirmed and appellants remanded to apply to the District Court for the relief which they seek to grant themselves at their own hearing.

Respectfully submitted,

LYMAN B. SUTTER,

Attorney for Appellee, Title Service Company.



No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, *et al.*,

Appellants,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

Brief of Appellees Federal Savings and Loan
Association of Wilmington.

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Association of Wilmington.**

Preliminary Statement.

This is the Brief of Appellee, First Federal Savings and Loan Association of Wilmington (hereinafter referred to as "Wilmington"). It is one of six Federal Savings and Loan Associations who are co-plaintiffs with the Federal Home Loan Bank of Los Angeles (hereinafter referred to as Los Angeles Bank) in an action [R. 9466] against the Federal Home Loan Bank of Portland,

sometimes known as Federal Home Loan Bank of San Francisco, John H. Fahey, individually, and as chairman of the Federal Home Loan Bank Board. We shall call the defendant bank the San Francisco Bank, and the Federal Home Loan Bank Board will be referred to as Bank Board. In this action the six Savings and Loan Associations sue in their own rights as member associations and stockholders of the Los Angeles Bank, and, also, on behalf of other stockholders as a class and member associations of the Bank, similarly situated. All seven plaintiffs seek to enforce legal and equitable claims to, to obtain possession of, and to remove liens from and clouds upon title to property within the territory of the Southern and Northern Districts of California.

While Wilmington is primarily interested in the outcome of this action (called the Los Angeles Action), its rights and interests are almost inseparably intertwined with certain issues of another action instituted by stockholders of the Long Beach Federal Savings and Loan Association (hereinafter referred to as Long Beach Federal), against the Federal Home Loan Bank Board, John H. Fahey, and others, arising out of the temporary seizure of and appointment of A. V. Ammann as conservator for Long Beach Federal. The interest of Wilmington in that other action (called the "Mallonee" action) arises from the fact that the Los Angeles Bank filed in the Mallonee action a cross-claim [R. 564] as well as a return [R. 3642] to a motion of Long Beach Federal [R. 3562], which was in effect a cross-claim, in the nature of a bill of interpleader.

This cross-claim and this return raise in substance the same issues as the Los Angeles action. But neither of the six Savings and Loan Associations are formal parties to the cross-claim and the return.

Both actions were consolidated “for all purposes,” on November 7, 1947, and the Preliminary Injunction from which this appeal was taken issued in the consolidated action.

Jurisdiction of District Court.

(a) The jurisdiction over the Mallonee action and its numerous interpleaders will, we are sure, be covered by counsel for the parties who started and cross-claimed in that action. We hereby adopt their jurisdictional statement as to that action.

(b) The Los Angeles action is a “Complaint to enforce legal and equitable claims, etc.” to property physically in California [R. 9455-6]. Jurisdiction over its subject matter rests upon Judicial Code, Section 57, then 28 U. S. C., Section 118, now 28 U. S. C., Section 1655. The pleadings call upon the court pass on the effect, scope and meaning of the Federal Home Loan Bank Act, particularly Sections 12, 17, 25 and 26 (12 U. S. C., Secs. 1421, 1499). In addition, the complaint presents the question whether or not certain orders of the Home Loan Bank Board by which the Los Angeles Bank’s assets and Wilmington’s assets in the hands of the Los Angeles Bank, found their way into the hands of the San Francisco Bank without the consent of Wilmington and the Los Angeles Bank, and without an opportunity to be heard, are reviewable either under Federal Case law or under the Administrative Procedure Act (5 U. S. C., Secs. 1001-1011), and if not, whether the Federal Home Loan Bank Act is in violation of the Fifth Amendment of the United States Constitution. The value of the property involved in the Los Angeles exceeds in the aggregate, exclusive of costs and interest, the sum of \$45,000,000 for the Los Angeles

Bank, and amounts in the case of Wilmington (exclusive of the value of its 84 shares of stock in the Los Angeles Bank).

A more particular discussion of various jurisdictional aspects will be found hereafter.

Jurisdiction of the Court of Appeals.

This Honorable Court has jurisdiction to pass upon the issues involved in the appeal by reason of 28 U. S. C., Section 1292(1).

Summary of Pleadings.

We adopt as our statement of the pleadings of the Los Angeles action the summary made by the Los Angeles Bank and certain of its members (pp. 5 to 7 of their brief). Stated in the briefest possible terms, the complaint seeks to quiet title and remove clouds on the title of their property by asking the court to determine what effect three administrative orders by the Federal Home Loan Bank Board, dissolving the Los Angeles Bank, had on its property. (These orders are designated as Orders No. 5082, 5083 and 5084.)

In addition thereto, we outline the pleadings which were filed by the Los Angeles Bank in the Mallonee action.

It first filed a cross-claim [R. 564]. This cross-claim is identical in substance with the First Count of the Los Angeles action and appropriate summaries of this First Count have just been included herein by reference.

The Motion of Long Beach Federal [R. 3562] to which the Los Angeles Bank made a return [R. 3642] alleges in substance that the San Francisco Bank advanced to A. V.

Ammann as conservator of Long Beach Federal between six and seven million dollars, which he secured by the hypothecation of assets of Long Beach Federal, that both the San Francisco and the Los Angeles Banks claim the right to receive repayment of this loan. That the court require that whichever of the adverse claimants has physical possession of Long Beach Federal's hypothecated assets, deposit enough of them in Court to cover the total possible maximum of the disputed claims and that all of Long Beach Federal's hypothecated assets not necessary for that purpose be returned to it [R. 3566-7].

To this motion the Los Angeles Bank made a return [R. 3642-3646], stating that it has a claim against Long Beach Federal; that Orders 5082, 5083 and 5084, purported to transfer its assets to the Portland Bank, to reorganize that Bank into the San Francisco Bank, and to dissolve the Los Angeles Bank; that it had at the time of the purported orders approximately \$45,000,000 in assets, whereas the assets of the Portland Bank were only some \$9,000,000; that the purportedly created San Francisco Bank has done business with the commingled assets of the Los Angeles Bank and Portland Bank; that San Francisco Bank has loaned to said Ammann as Conservator of Long Beach Federal large sums out of the commingled funds so that the loans made to Long Beach Federal are obligations owned in part to the Los Angeles Bank and in part to the Portland Bank, but that the amount and proportion thereof is not known to the Los Angeles Bank. It then demands that the San Francisco Bank be required to show the nature and extent of its loans to Long Beach Federal in order to enable the Court to determine which portion of said loans represented loans of money belonging to the Los Angeles Bank.

There were other interpleaders to which the Los Angeles Bank was not a party. Some of them are referred to in Point I of this brief.

While both the Mallonee action with its various interpleader actions, and the Los Angeles action were pending, the Bank Board issued an order (we shall refer to it as Order 2015), threatening the appointment of a receiver for Long Beach Federal [R. 8242, footnote 11]. This hearing, had it been held and had the Board's charges been sustained, would have resulted, under its own rules and regulations, in the appointment of the Federal Savings and Loan Insurance Corporation as receiver over the affairs of Long Beach Federal, and in its liquidation. (Federal Regulations 24, 1949 Amendment, Chapter 1C, Part 148.) While the direct effect of this threatened hearing upon Long Beach Federal was of no concern to Wilmington, it would have interfered with the subject matter of the above interpleader, namely, with assets of the Los Angeles Bank in which Wilmington, as a stockholder and one of the representatives of other stockholders of the Los Angeles Bank had a vital interest. The liquidator would have assumed and asserted control over these assets and would have attempted to manage them in connection with his activities as liquidator.

This was one of the considerations that induced the Court below to issue an order enjoining the holding of the administrative hearing. There were other considerations which will appear in the briefs of other appellees herein.

Statement of Facts.

The facts, as may be clearly seen, are numerous and involved.

(a) Events Leading Up to the Seizure of the Los Angeles Bank.

The events that antedate and lead up to the seizure of the Los Angeles Bank are stated most concisely in the complaint in the Los Angeles action [R. 9465-9501]. Particular attention is called to paragraphs 13, and 16-26 of this complaint [R. 9476, and 9480-9484]. These sections state the bare facts of the controversy. We do not feel that we could reduce them to a still more concise statement.

(b) Events Subsequent to the Seizure of the Los Angeles Bank.

On May 20, 1946, fifty-five days after the seizure of the Los Angeles Bank, the Bank Board issued its Order No. 5254 by which the seizure and liquidation of Long Beach Federal was decreed and a conservator appointed. Actual seizure of the assets also occurred. This act created a panic among the sixteen thousand depositors of Long Beach Federal and a run on Long Beach Federal resulting in a withdrawal of approximately ten million dollars in deposits.

One week after the seizure a Shareholders' Protective Committee which had been formed in the meantime instituted herein the first action demanding the return of Long Beach Federal to its management and asking that the Federal Home Loan Bank Act under which the seizures were purportedly made be declared unconstitu-

tional. In September of 1946 a special Three-Judge Court declared the Act of Congress unconstitutional. While an appeal from this decision was pending in the Supreme Court of the United States previously scheduled administrative hearings in which the Long Beach Federal was to be heard on the seizure were postponed, but when the decision of the Supreme Court on the appeal from the decision of the Three-Judge Court was announced (*Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030) the administrative hearing was reset for Los Angeles. The same issues that would have been aired in that administrative hearing were already before the Court in the *Mallonee* action; therefore, protests by the Shareholders' Protective Committee were made and the administrative hearing was vacated.

In January, 1948, Fahey was not re-appointed a member of the Home Loan Bank Board and on January 17, 1948, the two remaining members of the Home Loan Bank Board adopted Order No. 388 terminating the conservatorship over Long Beach Federal and directing the return of its assets.

Before all this happened the Los Angeles Bank had responded in the *Mallonee* action as indicated in the Summary of the Pleadings.

After the Long Beach Federal was returned to its original management, it found that during Ammann's conservatorship certain of its assets had been pledged to the San Francisco Bank, that the San Francisco Bank claimed to hold all of them as assignee of Ammann, as security for

advances to him as conservator. These advances, however, constituted \$6,300,000 whereas the pledged assets were vastly in excess of that sum. The indebtedness claimed by the San Francisco Bank to exist in its favor arose by reason of the fact that the San Francisco Bank had advanced to Ammann approximately \$7,300,000 among which were assets stemming from the seized Los Angeles Bank and to which the Los Angeles Bank still laid claim in spite of its purported seizure and dissolution. Its purported assets, out of which it made these advances stemmed from the seized Los Angeles Bank and the Portland Bank, the former's assets being \$45,000,000, the latter's \$9,000,000, that is to say,, in ratio of $\frac{5}{6}$ to $\frac{1}{6}$. The loan to the Conservator, therefore, came of necessity, from the assets of the Los Angeles Bank to the extent of $\frac{5}{6}$ of the total amount thereof. Long Beach Federal was aware of this claim by reason of the Los Angeles action which was filed as early as August 22, 1946, and also by reason of its cross-claim [R. 564] and its answer [R. 592] to Long Beach Federal's third-party complaint, both filed August 26, 1946. Being aware of the conflicting claims of the San Francisco Bank, Long Beach Federal filed its motion in the nature of a bill of interpleader, interpleading the two banks, which proceedings resulted in the deposit of all the disputed assets in the registry of the Court.

Following the restoration of Long Beach Federal, certain negotiations for settlement were made. We shall not summarize these except to say that they reached a stale-

mate when the Home Loan Bank Board issued a new order (Order 2015) setting an administrative hearing in which Long Beach Federal was asked to show cause why it should not be liquidated.

These settlement negotiations had proceeded for some time when Wilmington on September 1, 1949, moved the court for an order requesting all parties to report on the progress of the negotiations. The motion was to be heard on September 12. On September 9 the Home Loan Bank Board adopted Order 2015—obviously as an answer to Wilmington's motion. The Order itself was served on Long Beach Federal in court, while the motion was on for hearing. Before that time Long Beach Federal had no notice whatever of the second attempt to have its assets seized and to have a receiver appointed for its liquidation.

When matters reached this state and after appropriate proceedings which lasted during an entire night, the Court, on November 7, 1949, issued the preliminary injunction enjoining proceedings under Order 2015 and it is this injunction which is on appeal now before this Honorable Court.

Questions Presented.

I. Did the District Court have jurisdiction to issue the preliminary injunction restraining the hearing scheduled under the Home Loan Bank Board Order No. 2015 in order to protect its interpleader jurisdiction?

II. Was the issuance of the preliminary injunction proper under all the circumstances.

III. Has the Court acquired jurisdiction over the person of John H. Fahey individually and as Chairman of the Federal Home Loan Bank Board and the other Bank Board members?

Questions I to III are the only ones necessary to be considered or involved in connection with the appeal from the preliminary injunction. Questions IV to VI are not questions with which this Court is concerned on this review. We discuss them merely as an answer to appellants' contentions.

IV. Does the Court have jurisdiction to determine the issues of the Los Angeles action under the provisions of 28 U. S. Code, Section 118 (now Section 1655).

V. Does the District Court have jurisdiction in the consolidated actions to review Orders 2015, 5082, 5083 and 5084 under the terms of the Administrative Procedure Act, and to enjoin their being carried into effect pending such review?

VI. Has the Court power and jurisdiction to review Orders 5082, 5083 and 5084 independent of the provisions of the Administrative Procedure Act?

(a) In order to determine whether the statutory provisions of the Federal Home Loan Bank Act have been followed;

(b) To determine whether, in the event the provisions of the Federal Home Loan Bank Act mean to exclude a judicial review, they are violative of the Fifth Amendment of the Federal Constitution.

Summary of Argument.

I. The District Court had jurisdiction to issue the preliminary injunction in order to protect its interpleader jurisdiction.

(a) Sources of the Court's interpleader jurisdiction;

(b) Adversity of citizenship not required if the interpleader is ancillary to a main action;

(c) Long Beach Federal need not be a disinterested stakeholder;

(d) The jurisdiction in interpleader is not affected by the possibility that one of the claims may turn out to be spurious;

(e) Appellants have all appeared generally in Court;

(f) The Court, having acquired physical custody of the interpleaded *res*, has prior jurisdiction of disposing of all claims against it;

(g) In adjudicating interpleader controversies the Court can enjoin all attempts to litigate concerning the same *res* in any tribunal, judicial or administrative;

(h) In furtherance of the Court's interpleader jurisdiction its process is nation-wide.

II. The issuance of the injunction was not an abuse of discretion.

III. The Court has acquired jurisdiction over the persons of all appellants.

(a) The filing of Order No. 388 in the Trial Court constitutes a general appearance;

(b) The relief asked in connection with the filing of these orders constitutes a general appearance.

IV. The Court had jurisdiction to determine the issues of the Los Angeles action under 28 U. S. C., Section 118 (now Sec. 1655).

V. The District Court has jurisdiction in the consolidated actions to review Orders Nos. 2015, 5082, 5083 and 5084 under the terms of the Administrative Procedure Act, and to enjoin their being carried into effect pending such review.

(a) The Act is applicable to Order 2015;

(b) The Act makes possible a judicial review of Orders 5082 to 5084.

VI. The Court had power and jurisdiction to review Orders 5082, 5083 and 5084 under the provisions of the law as they stood prior to the Administrative Procedure Act.

(a) The Court can inquire whether the Orders 5082 to 5084 were made in conformity with the statute;

(b) If the act in question meant to exclude a hearing and a court review then the act is in violation of the Fifth Amendment of the Federal Constitution.

I.

The District Court Had Jurisdiction to Issue the Preliminary Injunction in Order to Protect Its Interpleader Jurisdiction.

The first interpleader was filed by Title Service Company [R. 43]. This was by way of cross-claim, in response to the Mallonee complaint, and ancillary to the Mallonee action in which Title Service Company has been sued as a fictitious defendant. Other interpleaders followed. There were over fifty of them. We do not summarize them all here. We do, however, refer to the motion of Long Beach Federal [R. 3563] and the return thereto of the Los Angeles Bank [R. 3642]. Wilmington, as one of the Bank's stockholders, was vitally interested in this interpleader. These pleadings have already been summarized. They were filed subsequent to the order of consolidation, and in view of the multitude of issues and cross-issues it would be reckless to say that Wilmington cannot be affected by the outcome of this interpleader. It is, of course, ancillary to the Mallonee action, and since it was filed after consolidation order it is ancillary likewise to the Los Angeles action.

The Title Service Company interpleader shows adversity of citizenship between the adverse claimants. The plaintiff shareholders, in the Mallonee action are California citizens, and defendants Fahey and Ammann, who while both officially citizens of the District of Columbia, resided privately in the State of Maryland and Massachusetts, respectively. This interpleader has been repeatedly supplemented and there are at least two answers to it by defendants Fahey and Ammann [R. 118, 5059].

There is no appearance by Fahey to the motion of Long Beach Federal by which the San Francisco Bank and the

Los Angeles Bank were called upon to state their claims to the disputed assets. But when, pursuant to that motion, Long Beach Federal, at a hearing on the motion, tendered a draft in Court in the sum of \$5,300,000 in addition to other money of the Long Beach Association already in the registry of the Court, in order to obtain a release of collateral of the Long Beach Association held by the San Francisco Bank, the attorney for defendant Fahey, and the Bank Board read into the record a telegram [R. 10,406] by which they disclaimed in effect any interest in the controversy concerning the interpleader of the Long Beach Association and the collateral which was to be replaced by the tendered check already referred to.

As a result of this hearing an order was made, depositing the collateral into the registry of the Court [R. 8399-8525]. It is this collateral in Court as to which the return of the Los Angeles Bank says that the loans securing it are repayable to it in part, and in part to the Portland Bank, but that the amounts and proportions are not known to it.

While this *res* was thus in Court, events transpired, further affecting the matters already interpleaded. Chronologically, they are as follows:

Prior to April 9, 1949, defendant and cross-defendant, Federal Savings and Loan Insurance Corporation (hereafter called "Insurance Corporation") claimed that there were premiums due it from Long Beach Federal for the insurance of the share accounts of depositors in the Long Beach Federal covering periods during which the Association was in the hands of the conservator. The shareholders of the Association, who were before the District Court through the Mallonee action, advised Long Beach Federal that the demand was improper and incorrect, and not

justly due, and that the shareholders would hold the corporation accountable if it paid the demand. To resolve this conflict Long Beach Federal filed still another "Petition in the Nature of Interpleader" [R. 6473], in which it set forth these facts and tendered the demanded premium into Court. To this petition there is a response by the Insurance Corporation [R. 6504]. There was a response, also, on behalf of the shareholders [R. 6631], and the Court finally made its minute order accepting said deposit [R. 7095-99].

These factual situations, it is claimed by Appellants, did not confer power upon the Court to entertain the bills, motions, cross-claims and petitions in interpleader, and to that main contention they add various subsidiary ones which we shall now answer.

(a) Sources of the Court's Interpleader Jurisdiction.

The interpleader jurisdiction of the District Court may be based on any one or more, or all of the following sources:

a. On the express provisions of the Interpleader Act, Sections 1335, 1397 and 2361 of Title 28 U. S. C.

b. On Rule 22 of the Federal Rules of Civil Procedure, which add to and liberalize the possibilities of interpleader by making that remedy available by way of cross-claim or counter-claim to defendants.

The motion of Long Beach Federal, by which it interpleaded the Los Angeles Bank and the San Francisco Bank in the consolidated actions, is clearly maintainable under Rule 22 by which a defendant may ask relief by interpleader in exactly the way in which Long Beach has done it.

The Title Service interpleader does not only satisfy the provisions of Rule 22 in the matter of interpleaders but, also, clearly satisfies the provisions of the interpleader statute for the following reasons:

1. The matter in controversy exceeds \$500.00.
2. The Title Service Co. is subject to adverse claims by the Long Beach Association and by the conservator, Ammann.
3. Both claimants are clearly citizens of different states. This jurisdiction cannot be defeated by the fact that Ammann is no longer the conservator of Long Beach Federal because events subsequent to the time when the jurisdiction did attach do not rob the Court of jurisdiction.

In *Mallors v. Equitable Life*, 87 F. 2d 233 (C. C. A. 7), this principle was confronted with a similar problem and in disposing of it, said:

“Subsequent disposition of some of the issues before the Court before judgment cannot oust the Federal Court of jurisdiction any more than a change of residence of one or more of the parties after suit is begun in the Federal Court may accomplish such a result.”

c. The Court also has general equity powers in connection with suits otherwise properly before it to entertain proceedings in the nature of interpleader. (*Security Bank v. Walsh*, 91 F. 2d 481 (9th Cir.).)

**(b) Adversity of Citizenship Not Required if the Interpleader
Is Ancillary to a Main Action.**

A well-established principle is that in the event the interpleader is ancillary to a suit otherwise properly before the Court, diversity of citizenship and the amount in controversy do not enter into consideration. In *6 Cyclopedia of Federal Procedure* (2nd edition), par. 2219, we read:

“If jurisdiction exists by reason of another suit pending to which the interpleader is ancillary, it may rest on the principal jurisdiction without regard to citizenship of the parties who have been duly served or have appeared, and without regard to the amount in controversy; * * * When an insurer’s interpleader complaint follows and grows out of a suit to cancel the policy, which failed, a counterclaim for the amount remaining, is ancillary to the main suit; especially when the decree reserved the right to the insurance; and the jurisdiction of the original suit supports the interpleader complaint as an ancillary one. In such a suit, moreover, it is not material whether the insurer did or did not know when the main suit was brought that there were adverse claims.”

**(c) Long Beach Federal Need Not Be a Disinterested
Stakeholder.**

It makes no difference that Long Beach Federal is not a disinterested stakeholder. If the motion, as here, has the characteristics of a bill in the nature of a bill of interpleader, jurisdiction is acquired, even if the interpleader himself has an interest in the *res*. To that effect is,

among other cases, *Hunter v. Federal Life Insurance Co.*, 111 F. 2d 551. We quote:

“The appellant also contends that the plaintiff’s bill does not contain all of the essential elements of a strict bill of interpleader in that it does not aver that there are two or more claimants in existence capable of interpleading and claiming a right to the proceeds of the policy, and in that the bill does not contain an averment that the plaintiff claims no interest in the proceeds of the policy or stands perfectly indifferent between the adverse claimants. It would serve no useful purpose to discuss the sufficiency of the averments of the bill as a strict bill of interpleader, since it was clearly sufficient as a bill in the nature of interpleader, which may be maintained by one who is not a mere stakeholder.” (Citing cases.)

(d) The Jurisdiction in Interpleader Is Not Affected by the Possibility That One of the Claims May Turn Out to Be Spurious.

The suggestion by appellants that the stockholders and Ammann are not really adverse claimants should not be countenanced in a Court of Equity which pierces the form and goes to the substances of the controversy. The suggestions that neither Ammanns nor the stockholders have any other rights or claims than Long Beach Federal may sound fine as theory but does not stand the test of reality. Obviously, nobody could be more at cross-purposes than the shareholders and Ammann.

Appellees contend that there is no merit to the claim which the shareholders assert to the insurance premiums. It cannot be assumed prior to the decision of the Court that this is so because whether or not the stockholders’ claim is valid or not, or whether on the other hand the

claim of the Insurance Corporation is valid, or not, is precisely the question which has to be decided. The cases hold uniformly that the Court's jurisdiction is not defeated because the claim of one of the claimants may turn out to be spurious. We quote from two cases in support of the statement just made.

In *Metropolitan Life v. Segarites*, 20 Fed. Supp. 739, the Court said at page 741:

“ . . . the jurisdiction of this Court to entertain an interpleader bill does not depend upon the validity or even *bona fides* of the claims of the respective defendants. It is obvious that in almost every case the claim of one of the parties will ultimately be determined to be invalid. That, however, is a matter for determination at the trial and cannot affect the jurisdiction of the Court. As we have shown, the purpose of an interpleader bill is as much to protect a stakeholder from the expense of double litigation, however groundless, as it is to protect him from the risk of double liability. That in the opinion of the Court he will ultimately escape the latter is no ground for refusing interpleader”

In *Hunter v. Federal Life*, 111 F. 2d 551 (8th Cir.), we read:

“The jurisdiction of a Federal court to entertain a bill of interpleader is not dependent upon the merits of the claims of the defendants. *Metropolitan Life Ins. Co. v. Segartis*, D.C., 20 F. Supp. 739. It is our opinion that a stakeholder, acting in good faith, may maintain a suit in interpleader for the purpose of ridding himself of the vexation and expense of resisting adverse claims, even though he believes that only one of them is meritorious. As the Supreme Court said in *Myers v. Bethlehem Corporation*, 303

U. S. 41, 51, 58 S. Ct. 459, 464, 82 L. ed. 639: 'Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.'

. . . ."

(e) Appellants Have All Appeared Generally in Court.

Appellants contend repeatedly that none of them have appeared generally in the action, that, therefore, they cannot be interpleaded, and that, moreover, they are not subject to suit. That certainly is not the case with the Insurance Corporation because it is expressly made suable in all Courts by Statute 12 U. S. C. 1725 (c)(4). It is subject to suit wherever it does business and it certainly did business in California.

The contention that appellants have appeared generally is treated in Point III of this Brief and most exhaustively in the brief of appellee Long Beach Federal. We respectfully refer to Point III and to the argument of appellee Long Beach Federal.

(f) The Court, Having Acquired Physical Custody of the Interpleaded Res, Has Prior Jurisdiction to Dispose of All Claims Against It.

It appears that the Court has in its physical custody by way of deposits into its registry the *res* of numerous interpleaders which, as already shown, was ancillary to the two main actions, while others, in addition, were also independent as interpleaders in their own right. Surely the District Court at that stage of the proceedings had acquired

control of the interpleaded funds and instruments. Its jurisdiction over the funds physically in its own registry *attached ahead of all subsequent claims* to power over the same *res*. Until it made a determination of these interpleaders nobody else could exercise jurisdiction or, if anyone did threaten to proceed, the Court had the power to issue injunctions and other orders restraining interference.

We cite again from *Cyclopedia of Federal Procedure, 2nd Edition*, Vol. 1, Section 112, in substantiation of our argument:

“With respect to property and property rights which are involved in a suit, the general rule is that priority in control of the property gives priority of jurisdiction. The possession of the *res* vests the court which has first acquired jurisdiction of it with the power to hear and determine all controversies within its judicial competency relating thereto, and for the time being disables another court from exercising a like power, property over which jurisdiction has been obtained being removed from the jurisdiction of all other courts until the judgment or decree is complied with. This rule has been applied in interpleader proceedings, partition suits, creditors’ suits, water right controversies, and is frequently controlling in particular types of proceedings hereinafter discussed, such as receiverships, probate proceedings and administration of estates, and foreclosures and lien enforcement suits. It holds good even though the United States itself is plaintiff in Federal Court in the second suit. For the rule to be applicable, one Court must already have actual or constructive possession which must be valid, and the allegedly conflicting actions must deal ‘either actually or potentially with specific property or objects’.”

In *Cramer v. Phoenix*, 91 F. 2d 141 (C. C. A. 8), the Circuit Court stated the same principle in the following language:

“It is elementary that where one Court takes jurisdiction of a specific thing, the *res* is as much withdrawn from the judicial power of another as if it had been removed to a different territorial sovereignty. The tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted. . . . It appears that the proceeds of the two policies were deposited in the registry of the lower Court. . . .”

“. . . In these circumstances that Court had exclusive jurisdiction and power to hear and determine all questions respecting title, possession, and control of them. . . .”

(g) In Adjudicating Interpleader Controversies the Court Can Enjoin All Attempts to Litigate Concerning the Same Res in Any Tribunal, Judicial or Administrative.

As soon as it appears that an interpleader may be maintained on the basis of any one or more of the three sources of interpleader jurisdiction already outlined, or as soon as it appears that an interpleader proceeding is ancillary to some main proceeding, the Court can enjoin any attempt to draw into question the same subject matter in any other forum.

Cyclopedia of Federal Procedure (2nd Edition), Sec. 2229, Vol. 6, p. 342, says:

“To afford the complete equitable relief essential to achieving the purpose of interpleader the protection of injunction against the bringing of separate

actions against the stakeholder is upon occasion necessary, and suits for interpleader in which actions in other courts were enjoined were familiar to equity when the Constitution was adopted. The decree at the end of the first stage of interpleader proceedings usually enjoins the claimants from suing the stakeholder. The earlier authorities held that the incidental relief of injunction might be given on an interpleader complaint but was limited by the Federal restrictions against injunctions to stay proceedings in State courts, and must stop short of such an injunction. But under the Interpleader Act of 1936 injunction may issue against the prosecution of claims in State or Federal courts, or a court of admiralty."

28 U. S. C. p. 2361 expressly authorizes injunctions. Since interpleader is an equitable proceeding and since courts of equity traditionally draw the entire controversy to themselves in an endeavor to do complete justice between the parties they will naturally enjoin any proceeding to litigate a controversy to which their jurisdiction has already attached. This indeed needs no lengthy citation of law. We limit ourselves to but one case. We refer to and incorporate by reference similar authorities in the other briefs. *Dugas v. American Surety Co.*, 81 L. Ed. 720, 300 U. S. 419, was an interpleader action wherein surety company deposited total amount of bond in the U. S. Court, which entered judgment thereon determining liability of the surety company to plaintiff. The judgment enjoined any other State or Federal court actions against the interpleading company. Defendant brought another action in the State court against another and different surety company on a different bond which nevertheless related to the same transaction, and upon which the inter-

pleading surety company would eventually be liable for payment. The interpleading surety company filed a *supplemental bill in its original interpleader action*, setting forth the indirect method attempted by defendant, to evade the prior interpleader decree, and referring to the earlier judgment and injunction in interpleader of the Court.

The Court under its interpleader jurisdiction, promptly enjoined any further prosecution of the new State court action. Plaintiff took this appeal to the Supreme Court challenging the jurisdiction of the District Court and particularly its power to enjoin proceedings against non-parties to the original interpleader action.

The District Court found that the new State court action against a different defendant was “in contravention of the spirit if not the letter of the decree in the interpleader suit.”

The United States Supreme Court affirmed the injunction and said (quoting the interpleader statute):

“Sec. 2. . . . Notwithstanding any provision of the Judicial Code to the contrary, said court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any other Federal Court . . . until the further order of the Court; which process and order of injunction shall be served by the United States marshals for the respective districts wherein said claimants reside or may be found.”

“Sec. 3. Said court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as

may be suitable and proper, and issue all such customary writs as may be necessary or convenient to carry out and enforce the same.”

* * * * *

“Plainly the court had jurisdiction of both the subject matter and the parties. An appeal was taken from either decree. Therefore Dugas was bound by both decrees. . . . But these rulings were all made in the exercise of the court’s jurisdiction, were subject to challenge and re-examination only on appeal, and became conclusive on him in the absence of an appeal. (Emphsais added.)

“5. The jurisdiction to entertain the supplemental bill is free from doubt. Such a bill may be brought in a Federal court in aid of and to effectuate its prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect, but subject to the qualification that the relief be not of a different kind or on a different principle. Such a bill is ancillary and dependent, and therefore the jurisdiction follows that of the original suit, regardless of the citizenship of the parties to the bill or the amount in controversy.

“6. The power of the court to enjoin Dugas from further prosecuting his suit in the State court on the appeal bond has full support in Pars. 2 and 3 of the Interpleader Act of 1926 before quoted, as also in settled adjudications respecting the power of a federal court to protect its jurisdiction and decrees.”

It will be said, no doubt, that the enjoined proceeding under Order 2015 were to have been conducted before an agency, not a court. But the considerations given apply with equal force if the subsequent proceeding is before an administrative tribunal. This was the express holding in

Dwinell-Wright Co. v. National Fruit Product Co., Inc., 129 F. 2d 848 (C. C. A.-1). In this case plaintiff sued in United States District Court over the ownership of a trade-mark. Defendant answers denying validity of the trade-mark registration, claiming defendant owned the registration. After answer in the Federal Court, three proceedings were filed. Defendant filed petition in United States Patent Office for cancellation of plaintiff's trade-mark registration. Plaintiff filed in the Patent Office a motion for stay of cancellation proceedings, and moved the District Court for injunctions to restrain defendant from prosecuting the cancellation proceedings in the Patent Office. Without following the proceedings in detail, here is what the Court said:

“The District Court in its memorandum of decision gave its reasons for granting the plaintiff's motion to restrain the defendant from prosecuting its proceeding for cancellation in the Patent Office as follows:

“‘It has long been settled that a court of equity which has first taken jurisdiction of a case may, in order to prevent vexatious and harassing litigation, enjoin the parties from further proceeding in another forum. While the jurisdiction of Federal Courts to interfere with State Court proceedings is sharply limited by statute, there is no reason why this principle should not apply between two Federal Courts, or between a Federal Court and an administrative tribunal of the United States. Time, expense, and inconvenience may be saved both to litigants and tribunals of the Court which first takes jurisdiction of an issue between two parties exercises its power to prevent multiplicity of actions and duplication of effort. It was said in *Gage v. Riverside Trust Co., Ltd., et al.*, C. C., 86 F. 984, 985, 999, ‘The propo-

sition that the court which first acquires jurisdiction of a cause and of the parties thereto will hold and maintain it, in order to settle and end the controversy, does not admit of question.’ ”

“Clearly it is just as harassing and vexatious, and there is just as much waste and duplication of effort involved in twice trying the same issue between the same parties whether the second trial is before an administrative tribunal or before a court.”

We shall show later (Point V) that the Administrative Procedure Act likewise authorized the injunction against carrying out Order 2015. Also it will be shown under Point III that the injunction was proper to protect the quiet title action from the threat of Order 2015.

**(h) In Furtherance of the Court's Interpleader Jurisdiction
Its Process Is Nation-wide.**

The proposition stated in the heading is expressed in several of the quotations already made. For better reference we give some authority so holding:

28 U. S. C. Sec. 2361;

Treinies v. Sunshine Mining Company, 308 U. S. 64, 84 L. Ed. 85.

See additional cases on the same point in briefs of other appellees.

This means that, in addition to the fact that Fahey and the Bank Board have made general appearances, the injunctive process of the District Court can reach them across State lines if it becomes necessary to protect the Court's interpleader jurisdiction.

We respectfully submit, therefore, that the preliminary injunction appealed from was within the power and jurisdiction of the District Court.

II.

The Issuance of the Injunction Was Not an Abuse of Discretion.

This Honorable Court, in reviewing the Order issuing the injunction, will not only inquire whether generally it has an action before it in which an injunction may issue, but it will also inquire whether, under the circumstances of the case, the issuance of the injunction was or was not an abuse of discretion. However, we do not understand that the Court is required to make a complete and exhaustive study of everything that has transpired since the two main actions were first instituted. Just as the preliminary injunction itself does not determine the merits of the controversy, so the review of the Order issuing the injunction does not decide anything about the merits of the case but merely whether the pleadings, or some of them, contain a jurisdictional basis for an injunction. That this exists, we have already shown. That the Court will not go further than just indicated is shown in the following quotations:

“It is enough at this time to determine that the bill contains allegations which, if proved, entitle petitioners to some equitable relief. Whether or not they sufficiently allege or prove their right to all of the relief prayed in the bill we do not decide because the question is not before us. Hence, if the District Court had jurisdiction it was proper to consider whether injunctive relief should be given in aid of the recovery sought by the bill. . . .

“We hold that the injunction was a reasonable measure to preserve the *status quo* pending final determination of the questions raised by the bill. ‘It

is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion.' (Citing authorities.)"

Deckert v. Independent Shares Corp., 311 U. S. 282, 85 L. Ed. 189 (1940).

" 'It is well established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised. * * * The duty of this court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits, but simply to determine whether the discretion of the court below has been abused.' (Citing authorities.)

" 'The only question presented by the record upon this appeal is whether the District Court abused its discretion in granting an injunction until the case could be heard upon the merits. * * * As no abuse of discretion is shown, the order must be affirmed.' (Citing authorities.)

"In *Ohio Oil Co. v. Conway*, 279 U. S. 813, 815, 49 S. Ct. 256, 73 L. Ed. 972, a *per curiam* the Supreme Court laid down the rule:

" 'Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final

decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.' *Love v. Atchison, Topeka & Santa Fe R. Co.* (C. C. A.), 185 F. 321, 331, cited in the above case, the court again stated the rule in such cases:

“‘An appeal from an order granting or refusing an interlocutory injunction does not invoke the judicial discretion of the appellate court. The question is not whether or not that court in the exercise of its discretion would make or would have made the order. It was to the discretion of the trial court, not to that of the appellate court, that the law intrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion?’ (Citing authorities.)

“‘The Appellant sets out 10 assignments of error. They all go to the merits of the controversy, and could very properly be discussed if the case were here after a full hearing. But the question this court at this stage is called upon to decide is whether the court below, having the discretion to grant or refuse the temporary injunction, has in this instance abused its discretion.’

“‘The Supreme Court generally disposes of appeals from interlocutory orders granting temporary injunctions by affirming upon the authority of cases holding that the matter rests in the sound discretion of the trial court. (Citing authorities.)

“We are not satisfied that there was any abuse of judicial discretion by the District Judge in granting the temporary injunction . . . *thereby preserving the status quo until a hearing on the merits.* This is the only question before this court on this issue.”

“Where questions both of law and facts are involved and the trial court in its discretion has issued a temporary injunction to preserve the *status quo* until these questions can be presented on final hearing, this court on appeal will not undertake to find the facts or to lay down rulings on specific issues. . . .”

Munoz v. Porto Rico Ry. Light & Power Co.,
83 F. 2d 262 (C. C. A. 1, 1936).

Numerous other cases could be added. But it is not necessary, especially since Appellants do not contend anywhere in their brief that an abuse of discretion was shown, but they rest their case entirely on the proposition that none of the various pleadings state a case or controversy in which the preliminary relief of injunction (or, for that matter, any relief) would be proper.

Nor is there any attack in Appellants' brief upon the findings of the Court on which the injunction is predicated. These are based not only on the pleadings but also on a hearing which, as recited, lasted from 2:00 P. M. on November 7th until 3:30 A. M. of the morning of November 8th. Since it is nowhere contended that

the pleadings and the evidence do not establish the findings on which the preliminary injunction is based, we respectfully refer to them, in particular to Finding No. 34 [R. 8249 to 8256]. Summarized, these findings are as follows:

“34. That the injuries threatened by the actions and proceedings hereby enjoined pending trial on the merits, or further order of this Court, are:”

(a) Undermining public confidence and faith in appellee Long Beach Association, taken from possession of appellants and given to appellees by prior order of the Court below.

(b) Causing fear in the depositors and thereby probably starting another run of withdrawals similar to, or greater than, the \$10,000,000.00 run of such withdrawals previously suffered when appellants first seized the association in 1946.

(c) Again clouding the titles to the homes of the 8,000 borrowers from said association, as such titles were previously clouded and rendered unmarketable during the first two years of the litigation.

(d) and (e) Orders by appellants inflicting penalties on appellees and thereby interfering with the process, orders and judgments of the Court below.

(f) and (g) Needless duplication and multiplicity of actions by requiring appellees to travel 3,000 miles to Washington, D. C. to duplicate the trial before the Court below. That such multiplicity of actions and duplication of trials violates Section 5(a) of

Administrative Procedure Act. 5 U. S. C. 1004(a) as to convenience of parties and their representatives.

(h) Appellants would appoint themselves receivers for liquidation of appellee solvent Long Beach Savings and Loan Association. That for appellees to have complied with the requirements of said Order 2015 calling said hearing before appellants, would have waived the issues of this litigation in multi-million dollar amounts specified in twelve sub-paragraphs of said finding, the aggregate of such amounts totals in excess of \$40,000,000.00.

(i) That appellants attempted to compel appellees to either default the pending proceedings before the Court below or default appellants' hearing (set before appellants by themselves), by deliberately timing appellants' hearings so as to conflict with Court hearings and thereby make impossible appellee's attendance on both hearings scheduled almost simultaneously, to be held at Los Angeles, California, and in Washington, D. C., 3,000 miles apart.

Under these findings alone it must be abundantly apparent, that, unless the Court is utterly without power to hear any of the matters with which it has struggled now these four years, an injunction was not only no abuse of discretion but was absolutely necessary to create a point of rest in this swirl of legal issues from which the rights of the parties could be examined without further interference by rival or subordinate tribunals.

III.

**The Court Has Acquired Jurisdiction Over the Persons
of All Appellants.**

While the Los Angeles action was originally instituted against the Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, and John Fahey individually and in his official capacity as Chairman of the Federal Home Loan Bank Board and who at the time of the institution of the action was serving purportedly as Federal Home Loan Bank Administrator and while he has since the institution of this action passed away, there are before the Court the proper successors in office. They are named in the caption of Appellants' Brief and they expressly name themselves appellants in the body thereof. They all argue that they are not properly before the Court and that they appear only specially. This, however, is not the case, since the record shows their appearance without reservation and under conditions which are inconsistent with a special appearance.

Whether the appearances to which we shall now call attention were made in the Mallonee action or in the Los Angeles Bank action would make no difference subsequent to the order of consolidation. That is to say, if any of their appearances subsequent to the consolidation order is general or inconsistent with a special appearance, then the appearance applies to both actions for all purposes.

**(a) The Filing of Order No. 388 in the Trial Court
Constitutes a General Appearance.**

After Fahey was no longer a member of the Board Order No. 388 of the Bank Board was filed in the District

Court [R. 8231]. It returned to Long Beach Federal the previously seized assets. This Order says: "Be it further resolved that a certified copy of this resolution be forthwith delivered to the above named court and to counsel for each of the parties of record in actions No. 5254 P.H. and 5678 (WM) P.H. in said court except counsel for intervenors in said action." The Los Angeles Bank action is one of the two actions referred to in the quotation by number.

(b) The Relief Asked in Connection With the Filing of These Orders Constitutes a General Appearance.

Pursuant to this order and in furtherance of its purpose and intent proceedings were had in the District Court [R. 10303 to 10334] in which the United States District Attorney for the Southern District of California appeared for defendant Fahey *et al.*, and William F. McKenna, principal attorney for the Home Loan Bank Board, appeared as attorney for the defendant Home Loan Bank Board. In connection with this hearing the true meaning of Order No. 388 was discussed and both attorneys referred to asked for different and various types of relief as follows:

(a) That all acts of the conservator of Long Beach Federal be validated [R. 10332];

(b) That a special election for directors of Long Beach Federal be held under the supervision of the Court [R. 10314];

(c) That a bond be furnished by the officers of Long Beach Federal [R. 10333].

While, as already stated, this appearance was in both actions it is particularly apparent that the actions of the conservator, Ammann, which were sought to be validated at the request of the attorneys for the Bank Board affect directly the Los Angeles action because it is precisely the dealings of Ammann and the question which rights and obligations, if any, were created thereby that is one of the issues in the Los Angeles action as well as of the cross-claim and return of the Los Angeles Bank. It is further important to note that these demands and requests were made without reservation, and without a statement that the appearances were special and if such a statement had been made it would have been of no avail because the things asked are inconsistent with a special appearance.

This follows from the decision of this Honorable Court in *Sterling Tire Company v. Sullivan*, 279 Fed. 336.

Cases coming to the same conclusion and on the basis of which it must be held that this appearance is a general one are these: *Edgill v. Felder*, 84 Fed. 69 (5th Cir.); *Merchants et al. v. Clow*, 204 U. S. 288, 51 L. Ed. 488; *Texas & P. R. Co. v. Eastin*, 214 U. S. 153, 53 L. Ed. 947; *Feldman v. Coon Ins.*, 78 F. 2d 838 (10th Cir.); *Alexander v. Hillman*, 296 U. S. 222, 80 L. Ed. 192.

These and similar cases have been analyzed in briefs of other appellees and we therefore refrain from doing so but respectfully refer the Court thereto.

There is, then, no merit to the contention that the appellants have not appeared generally.

Prefatory Note to Points IV to VI.

The matters discussed in Points IV to VI are in answer to contentions advanced in the Opening Brief of Appellants. They are not properly questions for this Honorable Court to pass on in connection with an appeal from a preliminary injunction. We include them, even though they are not issues material for a decision on this appeal, to show nonetheless that the contentions of appellants are without merit.

IV.

The Court Had Jurisdiction to Determine the Issues of the Los Angeles Action Under 28 U. S. C., Sec. 118 (Now Sec. 1655).

The question of the jurisdiction of this Honorable Court over the Los Angeles action is covered in the brief of the Los Angeles Bank and certain of its members (pages 13 to 16) and we respectfully refer thereto without repeating those arguments in this brief.

That Order 2015 threatened to interfere with the Los Angeles action and its orderly disposition has already been shown but, to repeat, its execution would have inevitably resulted in an interference with assets in dispute between the Los Angeles Bank and San Francisco Bank by the liquidator who might have been appointed in the proceedings under the Order.

The question as to the ownership of the disputed assets, upon the titles to which Orders 5082 to 5084 cast a considerable cloud, was before the Court in the Los Angeles action. It was a purely equitable action to quiet title. In the protection of its jurisdiction over that controversy

power to enjoin interference with the subject matter certainly rested with the District Court not only because of the consolidation of the Los Angeles action with the Mallonee action and its numerous interpleaders, but independently by virtue of the equitable issues which are raised in the Los Angeles action. In such an equitable proceeding under 28 U. S. Code, Sec. 1655, the Court has power over absent defendants and its process extends to them with the only restriction that if they do not appear the decree of the Court can be effective *only against the property in its jurisdiction*. The Los Angeles action, however, does not seek more than that.

This power over absent defendants *includes the power to enjoin them* from prosecuting or asserting claims in other tribunals involving the same property. If it were a fact, then, that the absent defendants constituting the Bank Board had not generally appeared, this would not stop the Court from further pursuing the Los Angeles action and from fully and completely adjudicating the rights of the respective parties thereto. The defendants, if they wanted to prevent this result and if, eventually, they wanted to affect these assets through proceedings under Order 2015, had the duty to set forth and assert their claims specifically in the Los Angeles action.

In support of the Court's power to issue an injunction against absent defendants in an action under Section 118 we cite *Harvey v. Harvey*, 290 Fed. 653; C. C. A. 7 (1923). This was a case brought in U. S. District Court in Wisconsin against defendants, residents of Ohio, to

adjudicate title to stock in a Wisconsin corporation. The certificates of stock were in the possession of one of the defendant corporations in Ohio and all defendants were residents of states other than Wisconsin. Appellants contend the action was *in personam* and could not be brought under Title 28, Section 118 U. S. C. (now new Title 28, U. S. C., Sec. 1655). Appellants particularly objected to a preliminary injunction issued by the United States Court in Wisconsin restraining out of state defendants from voting or otherwise dealing with the stock certificates *in Ohio*.

The Court of Appeals affirmed the preliminary injunction and said, at page 659:

“Appellant’s contention that the injunction granted relief *in personam* and therefore cannot be based upon service under section 57 (Sec. 118, Title 28), which applies to actions *in rem* is not well founded. This suit is in the nature of a suit to quiet title to personal property within jurisdiction of the court. The court has in its custody the *res*. It puts out its protecting hand and says to the defendants that the plaintiff claims the *res*; that pending the determination of that claim the *status quo* shall be maintained and the defendants restrained from using the *res*; that if they desire to contest the claim of the plaintiff to this property they shall come into court and do so . . .”

“. . . Consequently the court may determine the ownership, and, pending that determination, restrain all acts conflicting with the owner’s muniments and incidents of ownership. Thus it may

cancel contracts alleged to be fraudulent incumbrances upon plaintiff's title; *it may, in short, make any order that is necessary to secure to plaintiff the full enjoyment of his property within the court's jurisdiction, by injunction, or otherwise, if within the prayer of the bill.* [Citing cases.]

"These cases are appeals from the order granting a temporary injunction and the order refusing to vacate or dissolve the same. The merits of the controversy between the parties are not before the court, except in so far as necessary to determine whether the plaintiff by his bill and affidavits has made out a case sufficient to sustain the temporary injunction. . . ." (Emphasis added.)

Should Appellants now say, as they have intimated, that a decree quieting title in the disputed assets in the Los Angeles Bank is ineffective because it would require affirmative action on the part of some of them in recognizing the Los Angeles Bank as a corporate entity, whereas they had previously "liquidated" it, then this contention is fallacious.

Section 12 of the Federal Home Loan Bank Act confers upon each bank as organized all incidents attaching to bodies corporate if not inconsistent with the Act "as are customary and usual in corporations generally." It is customary and usual in corporations generally that certain of these rights continue beyond dissolution for the purpose of "allowing the complete and orderly winding up" of their affairs.

13 Am. Jur. Corporations, par. 357.

Paragraphs 357 to 380 discuss various arrangements that are “customary and usual”, but none of these have been followed in this case.

If, nevertheless, this doctrine should be inconsistent with the purposes of the Act, as appellants will undoubtedly say, and if the corporate existence of the Los Angeles Bank should be deemed immediately terminated for all purposes, then the proprietary interest of the stockholders which was in the stock before the dissolution and within the corporate assets, *immediately reverts to the assets of the corporation*. We quote in support of this rule 13 *Am. Jur., Corporations*, par. 412:

“Shares of stock in a corporation constitute a species of property entirely distinct from the corporate property and represent simply the proportion to which the respective shareholders, who may be such at the date of distribution, are severally entitled in the distribution of profits arising from the corporate business which may be made from time to time and in the final distribution of the estate of the corporation, when from any cause it shall cease to exist, and its estate shall have been fully administered. When one purchases or acquires stock in a corporation, no matter at what time, he acquires a fractional interest in the capital stock, assets, profits, and liabilities of the corporation. He does not, however, acquire any individual title to the property of the corporation, which is held solely by the latter in its own right as

an abstract but distinct individual entity. The earnings and profits of a corporation remain the property of the corporation until severed from corporate assets and distributed as dividends. Until that time stockholders have no property interest therein. The fact that one owns all the stock of a corporation does not make him the owner of its property. However, the act of dissolution of a corporation works a change in the form of the interests of its members by destroying the stock and substituting the thing which the stock represented—that is, a legal interest in the property—and leaves the members to such a division of this. * * *

That the Act recognized this general principle and its application to the stockholders of the Banks created under it appears plainly from a reading Section 26 thereof which provides, in part, that upon liquidation or reorganization the stock of the Bank should be “paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities.”

If, in passing upon the issues presented by the Los Angeles action, the District Court should decide that ownership of the assets of the Los Angeles Bank has not been changed and could not be changed in the manner provided by Orders 5082 to 5084, still no affirmative action on the part of appellants would be required to put that decree into effect. Since the San Francisco Bank, a body corporate, is before the Court, the Bank could be directed to deliver the assets to those persons or institutions which it finds entitled to them.

V.

The District Court Has Jurisdiction in the Consolidated Actions to Review Orders Nos. 2015, 5082, 5083 and 5084 Under the Terms of the Administrative Procedure Act, and to Enjoin Their Being Carried Into Effect Pending Such Review.

(a) The Act Is Applicable to Order 2015.

The trial judge was of the opinion that the provisions of the Administrative Procedure Act (5 U. S. C. Pars. 1001 *et seq.*) were applicable to the administrative proceedings leading up to Order 2015 and that inasmuch as the provisions of this Act were not followed, the Court under the Act had the power to enjoin the carrying out of the order pending judicial review.

He mentioned several particulars in which Order 2015 violated these new legislative safeguards against oppressive, illegal and arbitrary action by administrative agencies. We refer particularly to R. 11160 to 11161 where the pertinent remarks of the Judge are reported. More explicit arguments are advanced by appellees, other than those grouped around the Los Angeles Bank, and we hereby adopt their remarks on this point.

The Court was expressly authorized by Section 10 of the Act to issue an injunction in order to afford relief under these conditions. Subsection (d) of Section 10 reads as follows:

“ . . . Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon

application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.”

In this connection, the long struggle preceding the adoption of the Act and its legislative history clearly indicate an intention on the part of Congress to provide not only effective remedies against what had been considered by many, arbitrary administrative action, but also to provide new directions to the administrative process with adequate standards of fairness to all concerned and review provisions giving assurance that administrative abuses and unlawful administrative actions could be submitted to the Courts for full review. We incorporate their arguments by reference. A few administrative agencies are exempted from the Act by express provision but the ones before the Court here are not listed.

To their claim of exemption there is a complete answer in the language of the Supreme Court in the recent case of *Wong Yang Sung v. McGrath*, 339 U. S. 33, 94 L. Ed. 616 (Feb. 20, 1950). Petitioner in that case had been ordered deported as a result of hearings conducted by immigration inspectors, and sought habeas corpus, claiming that the hearings violated the Administrative Procedure Act.

The lower courts denied the writ. The U. S. Supreme Court reversed and directed the release of the petitioner because of failure to comply with the Administrative Procedure Act.

The Court said:

“The Administrative Procedure Act of June 11, 1946, *supra*, is a new, basic and comprehensive regulation of procedures in many agencies, more than a few of which can advance arguments that its generalities should not or do not include them. Determination of questions of its coverage may well be approached through consideration of its purposes as disclosed by its background.

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“The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.”

The Supreme Court reviewed the legislative background of the Act and said:

“Such were the evils found by disinterested and competent students. Such were the facts before Congress which gave impetus to the demand for the reform which this Act was intended to accomplish. It is the plain duty of the courts, regardless of their views of the wisdom or policy of the Act, to construe this remedial legislation to eliminate so far as its text permits the practices it condemns.

“Turning now to the case before us we find the administrative hearing a perfect exemplification of the practices so unanimously condemned. . . .”

“Nor can we accord any weight to the argument that to apply the Act to such hearings will cause inconvenience and added expense to the Immigration Service. Of course, it will, as it will to nearly every agency to which it is applied . . .”

“But the difficulty with any argument premised on the proposition that the deportation statute does not require a hearing, is that without such hearing there would be no constitutional authority for deportation. The constitutional requirements of procedural due process of law derives from the same source as Congress’ power to legislate and, where applicable, permeates every valid enactment of that body . . .”

“. . . We hold that deportation proceedings must conform to the requirements of the Administrative Procedure Act if resulting orders are to have validity.

“Since the proceedings in the case before us did not comply with these requirements, we sustain the writ of habeas corpus and direct release of the prisoner.”

In coming to this conclusion the Supreme Court merely carried out the intention of the Congress as reflected in the legislative history of the Act to which the other appellees have called attention.

Order 2015 bears date subsequent to Administrative Procedure Act and its provisions are therefore applicable.

To the extent that the Act requires new and more elaborate procedures than were customary in the agency before the effective date of the law, it grants those additional rights, as already shown in *Wong Yang Sung v. McGrath*. The contention of appellants that the Act requires them to do nothing which they did not do before its enactment is in the light of the *Wong Yang Sung* case manifestly erroneous.

(b) The Act Makes Possible a Judicial Review of Orders
5082 to 5084.

Since Wilmington is, however, more immediately concerned with Orders 5082 to 5084, and since those Orders were made prior to the effective date of the Administrative Procedure Act, the Board was obviously not in a position to follow provisions of law that did not then exist. This does not mean that we concede that the law existing at the time of the making of the Order was followed in arriving at these orders or that a review of the Orders was not available under the law as it existed prior to the Administrative Procedure Act. Indeed we shall show that the exact contrary is the case. However, the Administrative Procedure Act has been held to be remedial in nature.

Pittsburgh S. S. v. N. L. R. B., 180 F. 2d 731 (6 Cir., pending undecided before Supreme Court) holds Administrative Procedure Act as well as Taft-Hartley Acts are "remedial" and says (at page 733):

" . . . A remedial provision is applicable to pending actions *Ex parte* Collet, 337 U. S. 55, 69 S. Ct. 944, 959. In accordance with this rule since the decision of the Board preceded the enactment and the review was subsequent to the enactment, the Administrative Procedure Act and the Taft-Hartley Act were applicable to the judicial review.

"The Board concedes that the review in this court is controlled by the two statutes, but contends that the scope of judicial review as to findings of fact has in no way been affected by them. We think this contention is erroneous. The provisions of Par. 10(e) of the Administrative Procedure Act that the reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be

‘unsupported by substantial evidence’ and that in making this determination the court shall ‘review the whole record,’ is new. Moreover, the rules concerning evidence have been expressly changed by both the Taft-Hartley Act and the Administrative Procedure Act. . . .”

In *N. L. R. B. v. Pittsburgh S. S.*, 337 U. S. 656, 93 L. Ed. 1602, the Supreme Court said at page 1607:

“Second: A question remains as to the proper disposition of this case. It is urged upon us by the Board that, there being substantial evidences in the record to support the Board’s findings and order, we should remand the case with instructions to enforce the Board’s order without further delay. Without doubting the existence here of evidence substantial enough under the Wagner Act, *Consolidated Edison Co. v. National Labor Relations Bd.*, 305 U. S. 197, 229, 83 L. ed. 126, 140, 59 S. Ct. 206, to warrant the Board’s findings, we are not certain whether that standard controls this case. For questions have arisen whether the Administrative Procedure Act (June 11, 1946), 60 Stat. 237, c. 324, 5 USCA Subpar. 1001 *et seq.*, 2 FCA title 3, Subpar. 1001 *et seq.*, and the Taft-Hartley Act (June 23, 1947), 61 Stat. 136, c. 120, 29 USCA (1946 Fed. Supp. I), Subpar. 141 *et seq.*, 9 FCA title 29, Subpar. 141 *et seq.*, enacted between issuance of the Board’s order and the Court of Appeals’ decision, are applicable to and if applicable in any way affect Board procedures and the scope of judicial review of Board orders. The applicability and possible effect of either or both of these statutes apparently were not dealt with by the Court of Appeals, which neither discussed the statutes nor cited cases discussing them; the

statutes and their impact have not been briefed with any elaboration before this Court. These questions should be considered in the first instance by the Court of Appeals. Accordingly, in order to afford such an opportunity, we remand the cause to the Court of Appeals for proceedings not inconsistent with this opinion.”

This means, the Act applies to proceedings pending at the time it became effective. It would follow that, where the Act gives a right to review, previously nonexistent, that right attaches proceedings commenced previous to the effective date of the remedial statute.

50 Am. Jur. 8482, especially cases in Footnote 4.

What is our situation? Long Beach Federal filed its third party complaint [R. 286] on July 1, 1946, in which it seeks a review of this Court determining whether the Los Angeles Bank or San Francisco Bank is existing. In other words, it asks the Court to pass on the effect of Orders 5082 to 5084. The Los Angeles Bank filed on August 22nd a cross-claim also asking for a review and judicial declaration of the effect of Orders 5082 to 5084. While these pleadings are prior to the effective date of the Act, the actual controversy presented by these pleadings has not as yet been decided, so that the Administrative Procedure Act, becoming effective in the meantime, now grants a right to review these orders. In saying this, we do not concede that they were not reviewable, but will show under Point VI, that they were reviewable before.

VI.

The Court Had Power and Jurisdiction to Review Orders 5082, 5083 and 5084 Under the Provisions of the Law as They Stood Prior to the Administrative Procedure Act.

It is our contention that the Court has jurisdiction to review Orders 5082 to 5084 under the law as it existed prior to the Administrative Procedure Act. In making this argument we do not disassociate ourselves with the argument of the Los Angeles Bank and certain of its member associations to the effect that the decision of the issues in the Los Angeles action does not, of necessity, require a review of the Administrative Orders in question but requires only a consideration of their effect upon the assets and property of the Los Angeles Bank and with it of Wilmington.

Certainly the Court cannot be without power to determine what effect these orders had on Wilmington's and the Los Angeles Bank's property. In other words, it cannot be prevented to inquire and has power to decide whether there was statutory authority given to the Bank Board and to John H. Fahey to do and accomplish the things which the Orders purport to accomplish. That is to say, the Court must have power to decide whether legal authority vested in the Administration to transfer Wilmington's property and abolish its vested rights in the Los Angeles Bank or to substitute other purported rights therefor not agreeable to Wilmington, as Orders 5082 to 5084 attempted to do.

We shall divide the arguments under this point into two different subheadings in conformity with alternative views which may be taken on this question. A review of Orders 5082 to 5084 *first* requires a decision whether

they were made in conformity with the provisions of the statute under which Fahey claimed to have the power to make them. If the statute in question did not give Fahey the power to accomplish what the Orders purported to accomplish, or if the statute did not give him the power to accomplish it *in the way or by the methods* by which he sought to accomplish it, then the Orders are void because they did not follow the statute. If, on the other hand, the statute was exactly followed, but if the statute failed to provide those minimum safeguards which are required under our concepts of due process, *then* the question is whether the Orders are not void because the statute under which they were purportedly made is unconstitutional. We shall direct our remarks to these propositions under separate subheadings.

(a) **The Court Can Inquire Whether the Orders 5082 to 5084 Were Made in Conformity With the Statute.**

There should be no argument that administrative agencies are subject to the type of review indicated in the sub-heading. It cannot be the judge nor can it finally decide the limits of its statutory power. That is a judicial function. The Supreme Court said in *Social Security Board v. Nierotko*, 327 U. S. 358, 90 L. Ed. 719 (70 L. Ed. 719, at 727):

“ . . . Administrative determinations must have a basis in law and must be within the granted authority. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function. . . .

“We conclude, however, that the Board’s interpretation of this statute . . . goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the

ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation."

Still more recently the same principle was reiterated in *Board of Governors of the Federal Reserve System v. Agnew*, 329 U. S. 441, 91 L. Ed. 408. There the Board of Governors had removed Agnew and another as directors of a National Bank upon the grounds that they were partners in a stock brokerage firm. A bank director being such partner was prohibited by one of the sections of the National Banking Act to hold office.

The removed directors brought suit in the District Court to review the action of the Board and *to enjoin its action*. The District Court dismissed the complaint. The Court of Appeals reversed but was divided on the question. The U. S. Supreme Court reversed the District Court and held that an injunction could be issued and the case should be considered on the merits. The U. S. Supreme Court said:

"The Board contends that the removal orders of the Board made under §30 are not subject to judicial review in the absence of a charge of fraud. It relies on the absence of an express right of review and on the nature of the federal bank supervisory scheme of which §30 is an integral part. *Cf. Adams v. Nagle*, 303 U. S. 532, 82 L. Ed. 999, 58 S. Ct. 687; *Switchmen's Union of N. A. v. National Mediation Bd.* 320 U. S. 297, 88 L. Ed. 61, 64 S. Ct. 95; *Estep v. United States*, 327 U. S. 114, 90 L. Ed. 567, 66 S. Ct. 423. A majority of the Court, however, is of the opinion that the determination of the extent of the authority granted the Board to issue removal orders under §30 of the Act is subject to judicial

review and that the District Court is authorized to enjoin the removal if the Board transcends its bounds and acts beyond the limits of its statutory grant of authority. (Citing Authorities) . . . That being decided, it seems plain that the claim to the office of director is such a personal one as warrants judicial consideration of the controversy. (Citing Authorities.)”

Under these cases it would indeed seem self evident that the Bank Board here is not qualified to fairly decide the limits of its own power. It follows that the Court can inquire whether the Board has stayed within the limits of the power granted by the statute and whether it has exercised that power in the mode prescribed by the statute.

Various provisions of the Federal Home Loan Bank Act, which the Bank Board and Fahey were bound to follow and beyond which they were not authorized to go in issuing the Orders in question, have definitely been violated in connection with Orders 5082 to 5084.

There is a discussion of these matters in the brief of the Los Angeles Bank and certain of its member Associations, pages 29 to 35, which we hereby adopt. Essentially most of the grievances that resulted to Wilmington by reason of the Orders in question are due to the fact that it lost its position as a stockholder of the Los Angeles Bank. This was a valuable right and a property right. It is a peculiar and fallacious argument to say that since Wilmington was made, albeit against it will, a stockholder in another corporation, it suffered no invasion of its rights. That argument simply cannot stand.

We do not say that Wilmington could not under any circumstances lose its right to be a stockholder, but it could not lose that right or its position in the corporation without being heard. The Acts says this in so many words:

“* * * and the Board may, *after hearing*, remove any member, from membership, * * * in any such case the indebtedness of such member * * * shall be liquidated. Upon the liquidation of such indebtedness such member * * * shall be entitled to the return of its collateral and upon surrender and cancellation of such capital stock the member shall receive a sum equal to its cash paid subscriptions for the capital stock surrendered * * *” (Fed. Home Loan Bank Act, Sec. 6(1), see p. 118, Appellants’ Brief.)

It is not claimed that Wilmington was accorded such a hearing prior to the time that its stockholdership in the Los Angeles Bank was attempted to be terminated by the Orders in question. On the contrary the Board advances indirectly the very tenuous argument that while it cannot terminate the right of a single stockholder without a hearing it can terminate the rights of all the stockholders without a hearing.

This Los Angeles Bank was a very vital thing to Wilmington. The Bank was a body corporate expressly given “such incidental power not inconsistent with the provisions of this chapter as are customary and usual in corporations generally.” (12 U. S. C. para. 1432.) As a stockholder in the Bank Wilmington had voting privileges, certain rights to participate in the destinies of the Bank by its voice and the further right to expect the corporate existence of the Bank to continue until it was terminated *in the manner prescribed in the Act*.

Our argument under Point IV on the manner of liquidation applies here with equal force.

We look in vain in the spirit of the Act for authority to indulge in a summary liquidation by a stroke of the pen. On the contrary certain steps are definitely required but they have been covered in other briefs.

A finding must be based on evidence and any finding that affects the property rights of an individual adversely can be made only if that individual has had an opportunity to be heard. With respect to Wilmington's right to hold stock, that is put beyond dispute by the Act itself, and since that is so it follows that the purported facts which demand a dissolution, and with it a termination of Wilmington's stock ownership, must also be brought to its attention and it must be heard with respect to them.

A great deal could be said and many cases could be cited to the effect that where a statute requires a finding that requirement contemplates a hearing based on evidence before the finding can be made. But this matter especially has been covered in briefs of other appellees and therefore we hereby adopt their argument and their authorities. (Brief of Los Angeles Bank and certain member Associations, pages 17 to 21, and briefs of other appellees under the appropriate headings.)

Much has been said in appellants' briefs to the effect that Wilmington and the member Banks of the Los Angeles Bank were not in a position to question the validity of Orders 5082 to 5084. That contention has already been answered but it may not be amiss to reiterate the fact that anyone who has a proprietary interest in a

corporation and who finds himself, by whatever means or methods, of which he had no notice and opportunity to be heard, no longer a stockholder, certainly has a right to question the validity of acts which purport to accomplish that extraordinary result. Wilmington also deposited collateral with the Los Angeles Bank (to the extent of \$150,000.00.) It can question the validity of any act by which, without its knowledge or consent, an entirely different holder of that collateral is appointed. Even if we were merely dealing with a deposit it does not seem plausible that anyone would contend that that deposit could be arbitrarily changed from one institution to another. Not even the Insurance Corporation can do that in the event of a defaulting Federal Savings and Loan Association, but it must give the depositor an option whether it will accept a passbook in another solvent association or whether the depositor prefers to have his money repaid to him in the manner stated in the Act. (12 U. S. C. para. 1728(b).) These and the other matters already stated ought to dispose of this contention that Wilmington has no right to challenge the transactions which did all these things to it. On this point, we also adopt here pages 22 and 23 of the brief of the Los Angeles Bank and certain of its member Associations.

Into all of the foregoing matters the District Court has power to inquire when it passes upon the question whether Orders 5082 to 5084 passed the property of the Los Angeles Bank, and with it, of Wilmington, to the San Francisco Bank, or whether the Orders did not have that effect.

(b) If the Act in Question Meant to Exclude a Hearing and a Court Review Then the Act Is in Violation of the Fifth Amendment of the Federal Constitution.

Appellants advance an answer to the arguments under the previous subheading of this point and claim, *first*, that as one reads the Federal Home Loan Bank Act one must come to the conclusion that the determinations of the Board under Section 26 could be arrived at without a hearing, and, *second*, that a reading of the same Act shows that Congress did intend to vest the determination of the Board with administrative finality.

Neither of these two contentions is, as we have pointed out, correct, but to expect the acceptance of both would simply mean a complete abrogation of the safeguards of our Constitution. Valuable individual property rights simply cannot be taken away by statute unless the hapless holder of the property right has an opportunity to be heard. It is simply impossible under our conceptions of due process that all hearings may be dispensed with when a man's property is in question. There must be a hearing somewhere along the line, and so we say, supported by numerous authorities, that if the Act precluded a hearing as well as a judicial review of the action, that statute violates the Fifth Amendment of the Constitution. In order to prevent that result the courts have repeatedly held that statutes which are silent on the question of judicial review nevertheless do not, in being thus silent, preclude a judicial review. In this connection may we again adopt the discussion of other appellees on this point. In addition thereto, we call the Court's attention to but a few of the cases sustaining our contention. One of the most recent cases is *Estep v. United States of America*,

327 U. S. 114, 90 L. Ed. 567. This case presented appeals from convictions for violation of the Draft Act. Appellants sought unsuccessfully to defend in the courts below on the ground that the Draft Boards had exceeded their jurisdiction. Appellants, Jehovah's Witnesses, claim to be exempt from military service because they were ministers of the Gospel.

Congress, in the Act creating the Selective Service System, made no provisions for judicial review, and said at page 571:

“* * * For §10 (a) (2) states that the ‘decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.’ ”

* * * * *

“* * * Thus we start with a statute which makes no provision for judicial review of the actions of the local boards or the appeal agencies. That alone, of course, is not decisive. For the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. *American School v. McAnnulty*, 187 U. S. 94, 47 L. Ed. 90, 23 S. Ct. 33; *Gagion v. Uhl*, 239 U. S. 3, 60 L. Ed. 114, 36 S. Ct. 2; *Stark v. Wickard*, 321 U. S. 288, 88 L. Ed. 733, 64 S. Ct. 559. Judicial review may indeed be required by the Constitution. *Hg Fung Ho v. White*, 259 U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492. * * *

“The authority of the local boards whose orders are the basis of these criminal prosecutions is cir-

cumscribed both by the Act and by the regulations.

* * *

“* * * By §10 (a) (2) the local boards in hearing and determining claims for deferment or exemption must act ‘under rules and regulations prescribed by the President.’ Those rules limit, as well as define, their jurisdiction. * * *”

“* * * If a local board ordered a member of Congress to report for induction, or if it classified a registrant as available for military service, because he was a Jew, or a German, or a Negro, it would act in defiance of the law. * * *”

“* * * In all such cases its action would be lawless and beyond its jurisdiction.”

“We cannot read §11 as requiring the courts to inflict punishment on registrants for violating whatever orders the local boards might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction. * * *”

“* * * We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards ‘final’ as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency. * * *”

In a concurring opinion Mr. Justice Murphy said, at page 575:

“* * * Before a person may be punished for violating an administrative order due process of law requires that the order be within the authority of the

administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights. A court having jurisdiction to try such a case has a clear, inherent duty to inquire into those matters so that constitutional rights are not impaired or destroyed. Congress lacks any authority to negative this duty or to command a court to exercise criminal jurisdiction without regard to due process of law or other individual rights. To hold otherwise is to substitute illegal administrative discretion for constitutional safeguards. As this Court has previously said, 'Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.' *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 52, 80 L. Ed. 1033, 1041, 56 S. Ct. 720. This principle has been applied many times in the past for the benefit of corporations. *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287, 289, 64 L. Ed. 908, 914, 40 S. Ct. 527, PUR 1920E 814; *Dayton-Goose Creek R. Co. v. United States*, 263 U. S. 456, 486, 68 L. Ed. 388, 401, 44 S. Ct. 169, 33 ALR 472; *Panama Ref. Co. v. Ryan*, 293 U. S. 388, 432, 79 L. Ed. 446, 465, 55 S. Ct. 241; *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67. * * *

"A construction of the Act so as to insure due process of law and the protection of constitutional liberties is not an amendment to the Act. It is simply a recognized use of the interpretative process to achieve a just and constitutional result, coupled with a refusal to ascribe to Congress an unstated intention to cause deprivations of due process.

“* * * Due process of law is not dispensed on the basis of what people might have or should have done. The sole issue here is whether due process of law is to be granted now or never. The choice seems obvious.”

If in time of grave emergency constitutional liberties of individuals may not be abrogated to deny them a hearing or review, what, we ask, was the great emergency in this case that required the arbitrary and hasty action of the Bank Board?

Even if the Act justified the thought that the Board's action and findings are final, a judicial review will not be precluded when it is alleged, as it is here, that the actions were arbitrary, capricious and fraudulent. The Supreme Court has held that a review must be granted under less serious charges. *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. Ed. 90, U. S. Supreme Court (1902). This case presented an appeal from the District Court's refusal to enjoin the local postmaster from enforcement of fraud order and from dismissal of plaintiff's complaint without trial. The statute read: “The Postmaster General may, upon evidence satisfactory to him * * *” instruct postmasters to refuse delivery, etc. The lower court held the Postmaster's action was conclusive and not subject to judicial review. The U. S. Supreme Court, in reversing, said:

“That the conduct of the postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that Department,

which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief * * * — we do not mean to preclude the defendant (postmaster) from showing on the trial, if he can, that the business of complainants, as in fact conducted, amounts to a violation of the statutes as herein construed.”

It is plain, then, that though the Federal Home Loan Bank Act may be silent on the right of review, nevertheless, review provisions must be read into it in order to save it from being declared void under the Fifth Amendment of the Federal Constitution.

Conclusion.

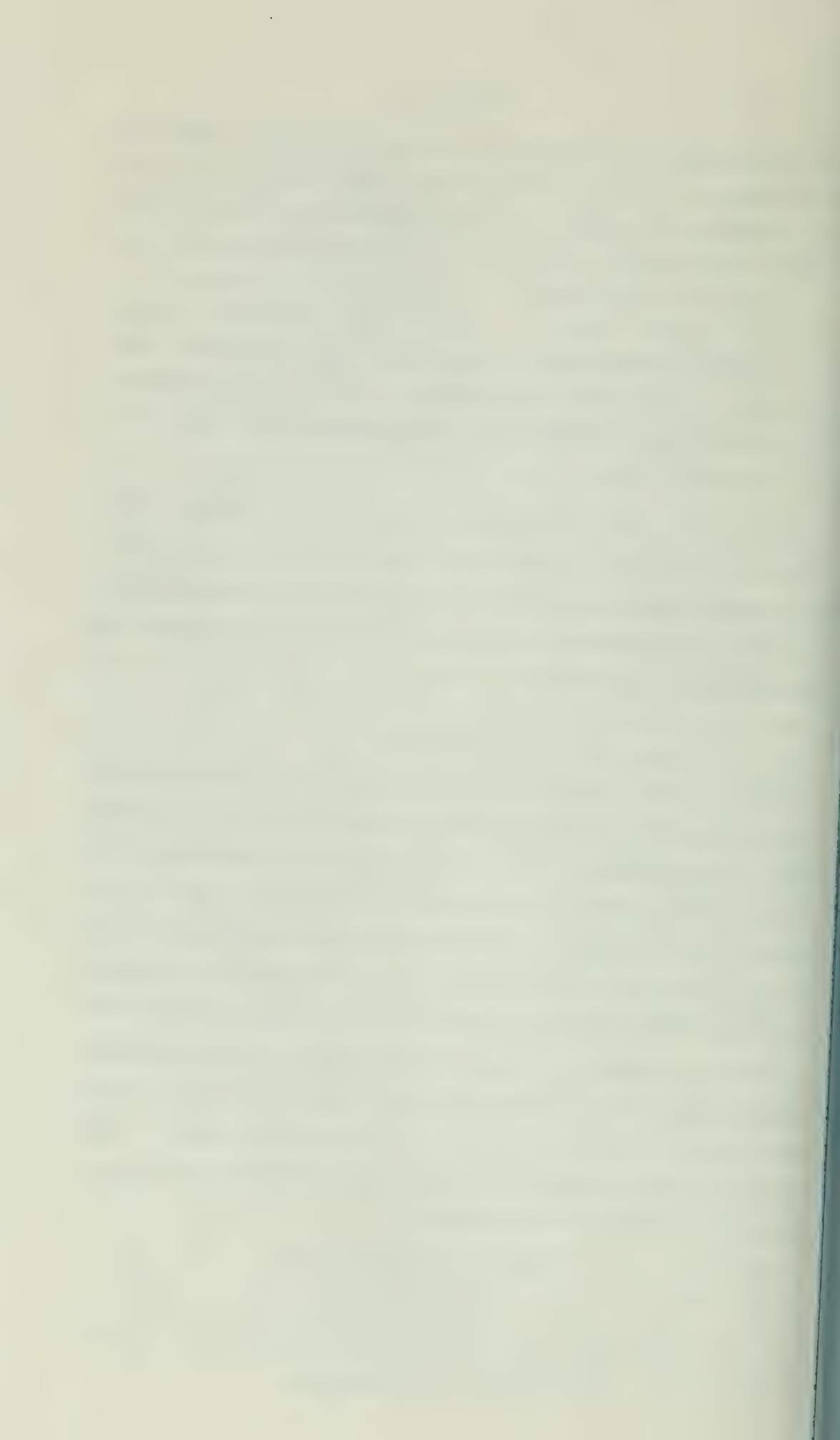
We feel that we should not lengthen this discussion by reiterating any other question stated by other appellees that may be pertinent to a decision of the issues before this Court. We adopt all such other questions by other appellees, as well as all points made by them under their questions, if they have any bearing on the propriety or power of the District Court to issue this preliminary injunction.

What we have said, we submit, clearly shows jurisdiction to issue the preliminary injunction; it clearly shows that under the circumstances it was proper; and it also clearly appears that the Court had sufficient jurisdiction over the appellants to issue it.

Respectfully submitted,

W. I. GILBERT, JR.,

*Attorney for First Federal Savings and Loan
Association of Wilmington.*



No. 12511
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, *et al.*,

Appellants,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

BRIEF FOR APPELLEE, ROBERT H. WALLIS.

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BRIEF FOR APPELLEE, ROBERT H. WALLIS.

PRELIMINARY STATEMENT.

In view of the consent of the Court that the six appellees who applied for permission may consolidate sections of their briefs and thus eliminate much repetition in the printed pages thereof, and as the briefs of the appellees Mallonee, *et al.*, plaintiffs below, and the Long Beach Federal Savings & Loan Association are comprehensive in scope and as other appellee briefs are concerned with interpleader jurisdiction, this appellee joins in and by this reference incorporates the briefs of said other appel-

lees. This brief will be restricted to matters of principal concern to the appellee, Robert H. Wallis. For purpose of brevity, the various individual parties will be referred to by the surnames, the Home Loan Bank Board will be referred to as the "Board," the Long Beach Federal Savings & Loan Association will be referred to as the "Association," the Federal Home Loan Bank of San Francisco, the Federal Home Loan Bank of Portland, and the Federal Home Loan Bank of Los Angeles, will be referred to respectively as the San Francisco Bank, the Portland Bank, and the Los Angeles Bank.

STATEMENT OF THE CASE.

The Board of Directors of the Long Beach Association were familiar with the unwarranted and unexcusable oppressive action of the appellants Fahey and Ammann in seizing the Los Angeles Bank which had assets of some \$46,000,000.00 which was solvent, prosperous and growing. They knew that without investigation, charges or hearing, the appellant Fahey had seized the bank without any warning whatever and transferred its assets to the infinitely smaller Portland Bank, having assets of only some \$9,000,000.00 and the transfer of the combined banks to San Francisco under the new name [R. 11].

All of these changes had taken place on one day, March 29, 1946 [R. 11]. The Association was a member of the Los Angeles Bank and its president, Mr. T. A. Gregory was a member of the Board of Directors of the Los Angeles Bank [R. 14]. The Association was a member of the Los Angeles Bank and had invested the sum of \$360,000.00 in the stock of the Los Angeles Bank [R. 14]. The Directors of the Association were aware

that this seizure had been caused by reason of the failure of the directors of the bank to submit to the dictation of the appellant Fahey in the election of a successor to its recently deceased president [R. 15-16].

These directors knew that the participation of their president in the request that the Congress of the United States investigate the overbearing demands of appellant Fahey might well bring retaliation upon their Association, which Association as is pointed out in other briefs was in an exceptionally healthy position and which except for the anticipated retaliation of Mr. Fahey for questioning his omnipotent authority had no occasion to fear any action on the part of the Government. Because of their fear, which later developments showed to be more than warranted, they adopted the resolution appropriating the sum of \$100,000.00 for attorneys' fees which was immediately seized upon by Mr. Fahey and his under underlings as a justification in itself for the seizure of the Association and the appointment of a conservator.

This resolution of the Board of Directors is self-explanatory and is as follows [R. 194]:

“Whereas, there have been indications that retaliation against this Association by those purporting to be representing the Federal supervising authorities, because the representative of this Association duly elected as director of the Federal Home Loan Bank of Los Angeles did not disregard the legal rights and best interests of said bank and submit to the dictation of the Federal Home Loan Bank Commissioner, and,

“Whereas, such retaliations are unwarranted and violate the principles of our democratic government

and are detrimental to the best interests of this Association,

“Now, therefore, be it resolved, that the officers of this Association be and they are hereby authorized to employ legal counsel to conduct appropriate legal proceedings to restrain the said Federal Home Loan Bank Commissioner or his deputies from interfering with the normal and proper conduct of this Association’s affairs,

“The sum of One Hundred Thousand and no/100 (\$100,000.00) Dollars is hereby appropriated and authorized to be expended for that purpose.”

It was only some fifty-two (52) days after the seizure and confiscation of the Federal Home Loan Bank of Los Angeles that the deluge descended on the Association. On May 20, 1946, without warning of any type or nature, the appellant Ammann appeared at the office of the Association and summarily confiscated the Association with the publicly announced intention of starting a “run” on the Association and thereby tearing it down [R. 117-118 and 478].

Pursuant to the above mentioned resolution, there was given to this appellee as general counsel for the Association, a check in the sum of Fifty Thousand and no/100 (\$50,000.00) Dollars, to be used by this appellee as such general counsel in resisting the appellants’ anticipated unlawful actions. The balance of the One Hundred Thousand and no/100 (\$100,000.00) Dollars appropriated was never drawn and the Fifty Thousand and no/100 (\$50,000.00) Dollar check was the only payment made under the authority of the resolution. The check was not

cashed, but following the service of the complaint on the appellee as a defendant therein, the check was deposited in court on June 12, 1946, concurrently with the filing of this appellee's answer and cross-claim in the nature of interpleader [R. 96].

The appellants Fahey and Ammann being unable to find any other excuse for the seizure of the Association, seized upon this defensive measure as their principal excuse for the seizure of the assets of the Association.

Mr. Harold Lee, appellant Fahey's deputy, was questioned and testified before the Congressional Investigating Committee as follows:

“Mr. Lee: I am willing to concede that I appointed a conservator upon the attempt to withdraw \$100,000, as I stated.

The Chairman: As I understand you, Mr. Lee, is this \$100,000 an incident upon which you base your action?

Mr. Lee: Yes.” [R. 206.]

In this connection, it is to be noted that the original order for seizure, No. 5254, dated May 20, 1946 [R. 2975-2976], contained no factual reason whatever for the seizure of the Association. It merely recited that some unknown persons had arrived at some conclusions of law, which in the minds of those unknown persons had led to the further conclusion that a conservator should be appointed. The Association asked for a more definite statement of cause for the appointment of a conservator

[R. 345] which was only slightly more definite [R. 134]. The appellants Fahey and Ammann were desperate for an excuse for the seizure. The solvency of the Association has never been denied. It had grown under the same management in twelve (12) years from assets of approximately seventy-five hundred dollars to assets in excess of twenty-six million dollars [R. 2970], and this same management had built up profits, undivided surplus and reserves in excess of one million three hundred thousand dollars [R. 2969] while continually paying dividends of $2\frac{1}{2}\%$ to 4% per anum [R. 2970].

All of the assets of this Association were physically located in Southern California [R. 2963], a fact which necessarily made the action of the plaintiffs for the restoration of the property, an action *in rem*, and strictly local in character. The fifty thousand dollar check above described was at all times located in the Southern District of California [R. 88].

The above described attempt on the part of the directors to defend their Association, its capital, surplus, profits and reserves, apparently offered the only available excuse, feeble as it was, for the unwarranted seizure [R. 206]. Mr. Harold Lee, Deputy Home Loan Bank Commissioner, and as such, appellant Fahey's spokesman, in testifying before the Congressional Committee investigating the Federal Home Loan Bank administration, stated that his office recognized that there was nothing improper in the Board of Directors authorizing action to

be taken to restrain Fahey and his deputies from interfering with the normal and proper conduct of the Association's affairs [R. 195]. Mr. Lee explained to the Congressional Committee that his objection to the appropriation was its size rather than its purpose. He testified as follows [R. 207]:

“Now I do want to make clear that we never have questioned and never would question the withdrawal of a fair and reasonable amount, to challenge the authority of the Federal Home Loan Bank administration. It has been done time and again and can always be done, but to spend hundreds of thousands out of these mutual institutions out there in this thing, we thought, is going too far.”

The hundreds of thousands of dollars spent and occasioned to be spent by the actions of the appellants herein dwarfed the size of the \$50,000.00 appropriation so bitterly complained of. The cost to the taxpayers for the pay and maintenance of appellants and their attorneys, if it could be accurately added, would be shown to constitute a staggering raid on the Federal Treasury and upon the assets of the so-called San Francisco Bank. In addition to this, the appellants, by virtue of their protracted dilatory tactics in opposing all constructive steps to keep the Association going and to give good title to borrowers, have taken a tremendous amount of time of the courts and court attaches. The special master in chancery appointed by the Court has alone received \$60,000.00 in fees of which only the last \$15,000.00 allowed has been

appealed from by these appellants. The total allowed by the Court to counsel for the various appellees, with the consent of the appellants, exceeds the sum of \$213,000.00. There has in addition been allowed on account of fees to the attorneys for the Los Angeles Bank and its members the sum of \$75,000.00 beside some \$50,000.00 in costs. The obvious determination of these appellants to prevent a trial on the merits, as must be evident from only a cursory scanning of the transcript of record in this case on this appeal, has caused such a tremendous expenditure of time, money and effort, that the \$50,000.00 appropriated compares with other attorneys' fees and costs as a mere pittance. In fact, it is probably a safe assumption to state that the appellants had caused to be spent more money complaining about this \$50,000.00 appropriation than is represented by the appropriation itself. The appellants obviously do not want the appellees to have the wherewithal to resist them. The appellants have endeavored in every way to wear down the appellees, and Mr. Fahey and his subordinates apparently believed that by frightening the directors of the Association into returning the \$50,000.00 check he would deprive them of the means with which to combat Fahey's own fraudulent and oppressive designs. We submit that the approval of the counsel fees in amounts many times the size of the original \$50,000.00 appropriation with the consent [R. 2473] or acquiescence of the appellants or their predecessors in itself constitutes a complete refutation to Mr. Lee's objection to the size of the above described

appropriation and destroys the principal ground claimed by the appellants as the reason for the otherwise unjustified seizure of the Association.

The appellants Fahey and Ammann were named cross-defendants in this appellee's cross-claim in the nature of interpleader [R. 86]. Summons was issued June 24, 1946 [R. 440-444], service was made, both by mail and by personal service in the District of Columbia by the Deputy United States Marshal [R. 440-447] on the cross-defendants Fahey and Ammann [R. 440-446]. By motion dated and filed July 5, 1946, the defendant Ammann moved to dismiss the answer and cross-complaint of this appellee [R. 390]. This motion was heard before a three-judge statutory court on the 15th day of July, 1946 [R. 743-745]. This Court found [R. 750] that the defendant Fahey had been duly and regularly served with process, both individually and in his representative capacity as Federal Home Loan Bank Commissioner. The Court concluded [R. 750] that the motion of Ammann to dismiss this appellee's cross-claim in interpleader should be denied and concluded [R. 751] that this Court had acquired jurisdiction over appellant Fahey and ordered [R. 752] that the motion of Ammann, both individually and as conservator for the Association to dismiss the answer and cross-claim in interpleader of this appellee be denied. The appellant Fahey moved to dismiss this appellee's cross-claim in the nature of interpleader by motion dated October 17, 1946, filed on October 21, 1946 [R. 810-812].

Ammann filed another motion to dismiss on September 8, 1947, which was denied November 10, 1947 [R. 2793]. Ammann filed his answer to the cross-claim in interpleader of this appellee on the 21st day of October, 1946 [R. 813-818]. In his answer, he charged [R. 816] that the \$50,000.00 check was unlawfully drawn and delivered to appellee; that the Association was the owner of and entitled to the check and that he [R. 814] was the conservator and in the lawful control of the operations of the Association from which it would follow that he claimed he was entitled to the check or its proceeds. Fahey filed his answer to appellee's cross-claim in interpleader on July 30, 1948, following the denial of his motion to dismiss. In his answer [R. 5056-5058], he incorporated and accepted as his own, all defenses and statements contained in the separate answer of the defendant A. V. Ammann.

It is also noted that Paragraph IX of the cross-claim in the nature of interpleader of this appellee [R. 94] the allegation appears that Fahey and Ammann claimed that they were entitled to and were the owners of the check and fund it represented. This allegation is not directly denied in either the answer of Fahey and Ammann [R. 5056 and 813]. The Plaintiffs Shareholder Committee and the Association answered the cross-claim in interpleader of this appellee [R. 302]. Both of these last named cross-defendants supported the position of this cross-claimant in his right to take and/or use the \$50,000.00 appropriated.

ARGUMENT.

I.

Jurisdiction.

(a) Cross and Consolidated Actions Intertwined.

The jurisdictional statement of appellants (App. Br. pp. 1-3) ignores the jurisdiction of the District Court conferred by the many cross-claims and interventions of parties to the consolidated actions other than those of the Association and of the Mallonee plaintiffs. Among these is the cross-claim in the nature of interpleader of Wallis. These various consolidated proceedings are so interrelated and involved one with the others it is impossible to conceive of a decision as to a portion not affecting the issues of others.

The holding of administrative hearings by appellants of the charges against themselves could not encompass all of the issues involved in this litigation so in any event many of the issues would have to be determined by the courts and there might well be a conflict of findings, conclusions and decisions resulting from the separate determinations of various elements involved.

If appellants are successful in this appeal the severing of some issues will entail a multiplicity of actions and the appellants will have partially succeeded in wearing down appellees by the need for more money, time and more harrassment while appellants merrily fritter away more of the taxpayers' money.

(b) The Mallonee Plaintiffs' Original Complaint Conferred Jurisdiction.

This point is elsewhere argued at length and in the interest of brevity will not be argued at length here.

In passing, however, attention is called to the fact that appellants have assumed the jurisdiction was claimed only under 28 U. S. C. 112 (now 28 U. S. C. 1331-2) and have ignored the jurisdiction conferred by 28 U. S. C. 118 (now 28 U. S. C. 1655) as appears in Appellant's Brief, page 2. Old Section 112 expressly made an exception to actions brought under certain sections of the Code, including Section 118 as it then stood.

One of the first cases in which the Supreme Court recognized the modern trend that corporations are amenable to suit wherever they do business was: *Eastman Kodak v. Southern Photo*, 273 U. S. 359, 71 L. Ed. 684 (1927).

In our present appeals, all appellants are "doing business" or "transacting business" within the territory of the district of the Court below and within the State of California. Of necessity, such business is local. It consists of the financing of homes, by mortgages, trust deeds, and other encumbrances upon real property.

Causes of action arising from such business, involving the title to such deeds of trust and real property, must be enforceable in the district where the real property is physically situated, or they cannot be enforced anywhere. A judgment of a Washington, D. C., Court, which might bind appellant Board, would be worthless against appellants Ammann, San Francisco Bank, Los Angeles Bank and other claimants.

Only a Court having *in rem* jurisdiction over the real property involved, can adjudicate in one action, as between

all the parties. Jurisdiction is either in the Court below in California, or for all practical purposes, there is no jurisdiction in any court.

The Court also has general equity jurisdiction in interpleader.

(c) The Cross-Claims in Interpleader (Including That of Wallis) Conferred Jurisdiction Over the Entire Litigation.

The jurisdiction of the District Court over the interpleader features of the litigation (except for the cross-claim of the Association, App. Br. p. 104) is not questioned by appellants in their brief unless the bare unsupported statement in the conclusion (App. Br. pp. 112-113) that all proceedings should be dismissed is to be considered an argument. We submit it follows that the jurisdiction of the Court over all interpleader claims except that of the Association is admitted by failure of challenge and that the jurisdiction so obtained is extant.

The appellants Fahey and Ammann, having been duly served in the Wallis interpleader pursuant to former 28 U. S. C. 41(26), now 28 U. S. C. 1335, 1397, 2361 and having answered, are now before the Court for all purposes.

The leading case covering federal jurisdiction in proceedings in interpleader, and the one most nearly in point in the instant case is that of:

Railway Express Agency, Inc. v. Jones, et al., 106 F. 2d 341 (C. C. A. 7).

The facts in that case are analogous to those in the case at bar in that a class suit was originally instituted by one

Jones, who, with many others of diverse citizenship had been victims of a nationwide fraud, to wit: the infamous Sir Francis Drake Estate solicitation. The proceeds of the fraud, in money, had been shipped by express and were actually in the hands of the appellant express company when the fraud was discovered and the action filed. Jones, on his own behalf, and for the other victims, all of whose individual losses had been less than \$500.00, but which aggregated in excess of \$24,000.00, commenced an action against the perpetrators of the fraud and the express company. The appellant express company filed an affirmative defense by a bill in the nature of interpleader admitting the possession of the funds, admitting no interest therein, but alleging the adverse interests of the plaintiff and other members of the class represented by him on the one hand, and the claim of the Collector of Internal Revenue who had appeared in the action and asserted a claim and lien on the funds by reason of non-payment of income tax by the principal perpetrator of the fraud, on the other hand, the unpaid tax being far in excess of the money held. The motion of the express company to be allowed to interplead was, by the trial court, denied, and the express company appealed. The two points raised on appeal were: (1) the right of Jones, based on the pleadings, to maintain a class suit, and (2) whether or not the express agency was within its rights in filing a counter-claim setting forth a cause of action in the nature of interpleader. The Circuit Court of Appeals held that whether or not any of the individual claimants had claims within the statutory amount, the

express company was entitled to file its equitable defense in interpleader and the Court stated at page 344:

“The Railway Express Co.’s right to file its interpleader is not established nor defeated by the merits of plaintiff’s claim . . .

“Where the possessor of funds can establish the essential and jurisdictional facts prescribed in the statute, his right to relief under this section (41) (26) is absolute.”

and at page 345:

“By proceeding under the counter-claim of the railway express the jurisdiction of the court was unassailable and the claims of all claimants may be litigated exactly the same as in a proper class suit.

“It therefore follows that as a matter of wise discretion, as well as of recognizing a right which the railway express possessed absolutely. The court should after the counter-claim was filed, have proceeded as provided for in the interpleader statute.” (Emphasis added.)

The foregoing case is very well reasoned and appears to set at rest the question of jurisdiction in those cases anticipated by subdivision (c) of the interpleader statute, *supra*, of the rights to introduce an equitable defense in interpleader or by bill in the nature of interpleader. It likewise conclusively established the jurisdiction in the District Court to take and maintain jurisdiction of all other parties to the action regardless of whether or not the Court would otherwise have had jurisdiction of them. This case is likewise authority for the bringing of a class action as was filed by the plaintiffs and appellees Mallonee, *et al.*

See also:

Treinies v. Sunshine Mining Co., 308 U. S. 66 at 70, in which this Court held that in such case, service may be had upon any claimant to the interplead property anywhere in the United States and (pp. 71-72) that only one defendant need reside in the district of suit;

Metropolitan Life Insurance Co. v. Skov, 45 Fed. Supp. 140;

Texas v. Florida, 306 U. S. 398, discussed at length in annotations 121 A. L. R. 1200 *et seq.* and in 83 L. Ed. 794;

Harris v. Travelers Insurance, 40 Fed. Supp. 154, 157.

If counter-claims set up causes of action within the jurisdiction of the Court as a court of equity they should not be dismissed, and on dismissal of the original action should be treated as original bills.

In no other district or court may complete relief be afforded. The District Court below has jurisdiction and the appellants have not disproved it.

This appellee's cross-claim in interpleader stands upon its own and should be treated as an original bill if the original action should be dismissed.

Vidal v. South American Securities Company, 276 Fed. 855 at 874.

In an action in interpleader under 28 U. S. C. A., Section 41(26), a motion to dismiss was made by a defendant. It was denied and the Court stated (p. 488):

"It is well established that the jurisdiction of equity to grant the remedy of interpleader is not dependent upon statute."

Cases cited in support:

American Bonding Co. v. Albert & Davidson Pipe Corp. (D. C. N. J., 1943), 52 Fed. Supp. 486, 488;

Rossetti v. Hill (C. C. A. 9, 1947), 162 F. 2d 892.

In *Maryland Casualty Co. v. Glassell-Taylor*, 156 F. 2d 519 (1946), action by bill in the nature of interpleader and complaint for declaratory relief. Plaintiff had issued surety bond for \$595,000.00 guaranteeing completion of a housing project.

Objection was made by defendants to the jurisdiction of the federal court and the District Court dismissed because of adequacy of remedies in the prior pending federal and state court actions.

In reversing the District Court, the Court said at page 523:

“We think the lower Court was in error in dismissing the complaint. It stated a cause of action under: (a) the Interpleader statute; (b) the Rules of Civil Procedure; and (c) the Declaratory Judgment Statute. The Court had jurisdiction of the parties and of the subject matter in all three of these aspects. . . .”

“The Federal Interpleader Statute and rule 22, Federal Rules of Civil Procedure, were not designed merely to prevent a multiplicity of suits and to protect the shareholder from multiple liability, but they were also intended to require all interested parties to come in and set up their claims in one case The Interpleader Statute was also designed to afford a means of process by which claimants to a fund, who *live in other states*, may be called in and re-

quired to litigate in one court to the end that all claimants to the fund, as well as the holder of the fund, may be given protection.

“We consider it important that the usefulness of the statutory remedy of interpleader, which has been greatly enlarged by the Interpleader Act of 1936 and by Rule 22 of the Federal Rules of Civil Procedure, should not be impaired by narrow and restrictive rulings. In such cases where jurisdiction clearly appears, Federal District Courts do not have the right to decline to exercise that jurisdiction. . . .” (Emphasis added.)

To same effect see *Cramer v. Phoenix, etc.*, 91 F. 2d 141, C. C. A. 8 (1937).

Wherein affirming interpleader jurisdiction the Circuit Court said:

“It is elementary that where one court takes jurisdiction of a specific thing, the *res* is as much withdrawn from the judicial power of another as if it had been removed to a different territorial sovereignty. The tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted. . . .”

Page 145:

“. . . In these circumstances that court had exclusive jurisdiction and power to hear and determine all questions respecting title, possession, and control of them.”

In *Security Bank v. Walsh*, 91 F. 2d 481, C. C. A. 9 (1947), plaintiffs in interpleader, a British corporation, sued conflicting claimants, all citizens of California.

Objection was made to the jurisdiction. The Ninth Circuit held jurisdiction existed notwithstanding lack of diversity.

As was stated by the Court in *Metropolitan Life v. Segaritis*, 20 Fed. Supp. 739 (1937), at page 741:

“ . . . the jurisdiction of this court to entertain an interpleader bill does not depend upon the validity or even bona fides of the claims of the respective defendants. It is obvious that in almost every case the claim of one of the parties will ultimately be determined to be invalid. That, however, is a matter for determination at the trial and cannot affect the jurisdiction of the court. As we have shown, the purpose of an interpleader bill is as much to protect a stakeholder from the expense of double litigation, however groundless, as it is to protect him from the risk of double liability. That in the opinion of the court he will ultimately escape the latter is no ground for refusing interpleader. . . .”

A case affirming the nationwide scope of process and injunction in interpleader arose from an appeal of a decision of this Court, decided by the United States Supreme Court in 1940. The case was:

Treinies v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85 (1940)—(Affirmed).

Litigation had proceeded in two state courts, one in the State of Washington and the other in the State of Idaho. The state courts arrived at conflicting conclusions as to ownership of several thousand shares of stock in the plaintiff Sunshine Mining Company.

The mining company, faced with conflicting judgments and litigation affecting the same stock, filed a new action

in interpleader in the U. S. District Court in Idaho and obtained an injunction against further litigation in both state courts. The U. S. Supreme Court, of its own motion raised the question of jurisdiction of the U. S. Court in interpleader and decided in favor of such jurisdiction.

The Supreme Court said:

“By the Act of January 20, 1936 (Old Title 28, Sec. 41, Sub. 26), the district courts have jurisdiction of suits in equity, interpleading two or more adverse claimants, instituted by complainants who have property of the requisite value claimed by citizens of different states. The suit may be maintained ‘although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.’”

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“The Interpleader Act authorizes the enjoining of parties to the interpleader from further prosecuting any suit in any state or United States on account of the property involved. *Such authority is essential to the protection of the interpleader jurisdiction and is a valid exercise of the judicial power.* (Emphasis added.)

The parties to the appeal attempted to relitigate the jurisdiction of the state courts which had made final judgments determining such question of jurisdiction. In refusing to permit relitigation of jurisdiction when the

judgments of the state court had become final, the Supreme Court said:

“One trial of an issue is enough. The principles of *res judicata* apply to questions of jurisdiction as well as to other issues, as well to jurisdiction of the subject matter as of the parties.” (Citing authorities.) (Emphasis added.)

In *Hunter v. Federal Life Ins. Co.*, 111 F. 2d 551, C. C. A. 8 (1940), the Court stated at page 555:

“The appellant’s first contention is that the court below was without jurisdiction, because diversity of citizenship did not exist, the claimants all being citizens of Arkansas, and the plaintiff being a nominal party.” . . .

“The jurisdiction of a federal court to entertain a bill of interpleader is not dependent upon the merits of the claims of the defendants. *Metropolitan Life Ins. Co. v. Segartis*, D. C. 20 F. Supp. 739. It is our opinion that a stakeholder, acting in good faith, may maintain a suit in interpleader for the purpose of ridding himself of the vexation and expense of resisting adverse claims, even though he believes that only one of them is meritorious.”

Mallors v. Equitable Life, 87 F. 2d 233 (C. C. A. 7, 1936).

Removal of appellant Ammann as conservator could have no effect on the jurisdiction of the Court below (interpleader or otherwise) because as above stated disposition of any of the issues by the Court before judgment make no change in Federal jurisdiction.

(d) Service of Summons in Interpleader Actions May Be Had Outside the District in Which Brought if the Court Has Original Jurisdiction.

Under former 28 U. S. C. 21 (26) and Rule 22 Federal Rules of Civil Procedure and now embodied in 28 U. S. C. 1397 "any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside." 28 U. S. C. 1397. The fact that different claimants reside in different states does not defeat this jurisdiction. *Globe Indemnity Co. v. Puget Sound Co.* (D. C. N. Y. 1942), 47 Fed. Supp. 43.

(e) Jurisdiction Is Conferred by Doing Business.

Appellants Board, Federal Savings and Loan Insurance Corporation, Ammann and Bramley, all claim immunity from suit and that the Board is an indispensable party, therefore even though service of summons is made upon other appellants within the district, because the appellant Board did not physically and personally come to California to make its seizure but instead sends its deputies, appellant Ammann, its *alter ego* Federal Savings and Loan Insurance Corporation, and its dominated San Francisco Bank to perform its functions, they contend all are immune from judicial process in the very district in which they seized and confiscated the real estate and personal property.

The corporate and administrative structure of these inter-related and interlocking agencies and boards is determinative of the Congressional intent that all should respond to the courts of the district in which they do business and carry out their statutory functions.

It is obvious that Board, through its multiple agents in their various capacities, has at all times been and now

is doing business throughout the 48 states, and particularly as concerns this litigation in the State of California and in the Southern District United States District Court.

In *Seven Oaks v. Federal Housing Administration*, 171 F. 2d 947 (C. C. A. 4, 1948), the Court stated:

“ . . . The complaint alleges three causes of action, the first two of which ask damages on account of alleged negligence and wrongful conduct and the third seeks to have a trust in favor of plaintiff declared with respect to certain real estate in the district owned by the Housing Administrator. . . .

“(1) We think that the venue was proper and that there was error in dismissing the suit. The Eastern District of Virginia was the district in which the cause of action arose, the Housing Administration was carrying on business in that district and one of the purposes of the suit was to have a trust declared on real estate there situate. We think that the statute permitting suit against the Housing Administration authorized suit within the district; that irrespective of this, the suit was properly brought within the district because of the venue statute relating to corporations; and that, in any view of the case, it was properly brought as to the third cause of action alleged which was a local action relating to real estate within that district.

“(3, 4) The contention that it was the intention of Congress that the venue of suits against the Housing Administration be limited to the District of Columbia, the official residence of the Administrator, or that the Administration should have the discretion to say when it might be used elsewhere by waiving venue, will not bear analysis. Congress

certainly knew, when providing for suit in state courts, that there were no such courts in the District of Columbia; and when it provided that a great business agency authorized to engage in business throughout the country might sue and be sued like an ordinary business corporation, it could hardly have intended that persons in California, Hawaii or Alaska, desiring to exercise the right to sue must travel to the District of Columbia to do so. *Cf. Ferguson v. Union National Bank of Clarksburg*, 4 Cir. 126 F. 2d 753, 757.

“It must be conceded by everyone that it is highly desirable that a federal agency such as the Housing Administration be suable in the district where it is doing business on causes of action arising out of the business done there.” . . .

Particular attention is called to the language: “It could hardly have intended that persons in California . . . desiring to exercise the right to sue must travel to the District of Columbia to do so.” This should be decisive of any question of the appellants being indispensable parties.

Among the issues in this litigation is the ownership and voting rights of stock in whichever of the Federal Home Loan Banks of Portland, San Francisco or Los Angeles are found by the Court to be in existence. The Preliminary Injunction, the subject of the present appeal, was granted by the Court below to preserve the *status quo* pending its decision of that (and other issues) to be decided on the trial on the merits.

The jurisdiction of a District Court to enjoin non-resident defendants under identical circumstances was considered in the case of *Harvey v. Harvey*, 290 Fed. 653 (C. C. A. 7, 1923).

The Court of Appeals affirmed the preliminary injunction and said at page 659:

“Appellant’s contention that the injunction granted relief *in personam* and therefore cannot be based upon service under section 57 (Sec. 118, Title 28), which applies to actions *in rem* is not well founded. This suit is in the nature of a suit to quiet title to personal property within jurisdiction of the court. The court has in its custody the *res*. It puts out its protecting hand and says to the defendants that the plaintiff claims the rest; that pending the determination of that claim the *status quo* shall be maintained and the defendants restrained from using the *res*; that if they desire to contest the claim of the plaintiff to this property they shall come into court and do so. . . .”

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“. . . Consequently the court . . . may, in short, make any order that is necessary to secure to plaintiff the full enjoyment of his property within the court’s jurisdiction, by injunction or otherwise, if within the prayer of the bill.”

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“These cases are appeals from the order granting a temporary injunction and the order refusing to vacate or dissolve the same. The merits of the controversy between the parties are not before the court, except in so far as necessary to determine whether the plaintiff by his bill and affidavits has made out a case sufficient to sustain the temporary injunction . . .” (Emphasis added.)

II.

The Appellants Herein Are Proper But Not Indispensable Parties to the Action in General and the Cross-Complainants in Interpleader in Particular.

The appellant members of the Board are not indispensable parties to this action. They may be proper parties for the trial of the case but they are not indispensable to the complete determination of this action. The appellants cite (App. Br. pp. 43 and 101) the case of *Williams v. Fanning*, 332 U. S. 490 (1947), for the proposition that this Court has no jurisdiction over the persons of indispensable parties. The *Williams* case gives a formula for use in determining the indispensability of a superior governing officer, to-wit: "The superior officer is an indispensable party if the decree granting the relief sought will require him to take action either by exercising directly a power lodged in him or by having a subordinate exercise it for him." But the *Williams* case held that the Postmaster General was not an indispensable party in an action brought to enjoin the local postmaster from carrying out a postal fraud order issued by the Postmaster General, after a hearing. The Supreme Court stated that the Postmaster General was not indispensable because the decree entered would effectively grant the relief desired by expending itself on the subordinate official who was before the Court.

"The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the Smith and Fall cases or indirectly through his subordinate as in the Rutter case. No concurrence on his part is necessary to make lawful the payment of the money orders and the release of the mail unstamped. Yet that in all the court is asked to command." (P. 494.)

Similarly, in the present case, the decree will effectively grant the relief desired by the complaint by expending itself on the subordinate officials and entities who are before the Court. The decree in order to be effective need not require the Board to do a single thing, either directly or indirectly. No concurrence on their part is necessary to restore the assets and property of Wallis or other interpleaders, the Association or of the Los Angeles Bank to it or to clear the title of the plaintiffs, cross-claimants and the bank to their respective properties and assets. The Court does not have to direct the Board to dissolve the San Francisco bank and to reestablish the Los Angeles Bank or to determine the ownership of the property interplead.

For further cases demonstrating that the Board is not an indispensable party to this action, see the following cases:

Hynes v. Grimes Packing Co., 337 U. S. 86, 96 (1949) (Secretary of the Interior not an indispensable party to a suit to enjoin the exclusion of commercial fishermen from shoreline waters designated as an Indian reservation by the Secretary, on the ground of the invalidity of the Secretary's order and regulation);

Jeager v. Simrany, 180 F. 2d 650, 651 (C. C. A. 9, 1950) (Commissioner of Immigration not an indispensable party to a suit for declaratory judgment and injunction against the local immigration officer, to prevent him from proceeding to cancel a record of registry and a certificate of lawful entry to an alien);

Rank v. Krug, 90 Fed. Supp. 773, 802 (D. C. S. D. Cal., 1950) (Secretary of the Interior and the United

States not indispensable parties to a class suit to enjoin interference with plaintiff's water rights by reason of erection of a dam under Federal Reclamation Law);

Reeber v. Rossell, 91 Fed. Supp. 108, 111 (D. C. S. D. N. Y., 1950) (Administrator of Veterans' Affairs and Chairman of Civil Service Commission not indispensable parties in action for declaratory judgment that administrator's order was null and void as against the plaintiffs);

National Radio School v. Marlin, 83 Fed. Supp. 169, 170 (D. C. N. D. Ohio, 1949) (Administrator of Veterans' Affairs not indispensable party to suit to enjoin local veterans finance officer and others from withholding issuance of vouchers for veterans' tuition).

Other cases to the same effect are *Colorado v. Toll*, 268 U. S. 228; *Jarvis v. Shachelton Inhaler Co.*, 136 F. 2d 116; *Esquire Inc. v. Walker*, 155 Fed. Supp. 1015; *American School v. McAnnulty*, 187 U. S. 94; *Homer Glen Wilcox v. DeWitt*, 144 F. 2d 353; *Chester C. Fosgate Company v. Kirkland*, 19 Fed. Supp. 152.

The attempt to merge, liquidate and seize the Los Angeles Bank and the Association, both situated in Los Angeles County, California, and at the same time to claim immunity from the United States Courts under a theory that appellants are privileged to create havoc in California but can only be reached by suit if at all by the victim 3000 miles away in Washington, D. C., to test the validity of such actions comes with very poor grace from Government officials appointed to protect the savings and homes of the people.

The unfairness of such a situation as sought by appellants is discussed by the Supreme Court in the case of *First National Bank of Canton v. Williams*, 252 U. S. 504.

There can be no indispensable or unservable parties to an action *in rem* involving possession and title to real and personal property situated within the territory of the District Court.

The Court, having jurisdiction of the *res*, summons the parties to come and defend their rights to the *res*. Regardless of whether they appear or default, the Court proceeds to decide ownership and possession of the title. If an owner or possessor of the property is immune from suit, he must respond to the Court and present his claim for immunity, for immunity can be waived. If the claim of immunity is made, the Court must then exercise its jurisdiction to decide whether or not the claimed immunity does actually exist. Such determination is an exercise of jurisdiction by the Courts to determine its jurisdiction. Often such jurisdiction can only be determined by a trial on the merits.

Land v. Dollar was such a case. 300 U. S. 731, 91 L. Ed. 1209 (1947). The Supreme Court said:

“ . . . We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits.”

To the same effect see:

Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 44 L. Ed. 647 (1900).

In *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 93 L. Ed. 1231 (1949), the case arose on the application of a regulation to the Secretary of the Interior as to

Salmon Fishing in waters in Alaska. The plaintiffs, the fisheries, claimed that the action and regulation was invalid and obtained an injunction against the Regional Director of Alaska of the Fish and Wild Life Service seeking an injunction to prevent the enforcement of the invalid regulation. The District Court granted the injunction, the opinion being in 76 Fed. Supp. 43. This Court affirmed the granting of the injunction the opinion being in 165 F. 2d 323. U. S. Supreme Court affirmed both these judgments various questions being involved. One of the principal defenses made was that the secretary of the interior was an indispensable party and that the action could not proceed nor the injunction be granted in his absence. The contention was overruled in all three opinions and was affirmed by the U. S. Supreme Court which held under the doctrine of *Williams v. Fanning* that if the injunction would be effective without any action by the absent government official he was not an indispensable party.

In *Int. Shoe Co. v. Washington*, 326 U. S. 310, 90 L. Ed. 95 (1945). At page 104 the Court stated:

“But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”

III.

The Effect of the Decisions of the Supreme Court in This Litigation Was to Return the Case to the District Court for Trial and Other Proceedings.

Appellants have made jurisdiction of the subject matter and jurisdiction of the parties the subject of appeals, writs, motions to dismiss, and motions to quash. Notwithstanding these attacks, jurisdiction of the Court below has been sustained and upheld in the six appeals and writs thus far decided out of the ten such appeals and writs taken by appellants. Jurisdiction of the Court below has never been denied by any Appellate Court in these proceedings.

On appeal to the U. S. Supreme Court, appellants urged dismissal of the action. It was not granted. The U. S. Supreme Court in *Fahey v. Mallonee*, 332 U. S. 245, said at pages 256-7:

“ . . . nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies.”

and at page 257:

“It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs’ charges that ill will and malice actuated the supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are alike undetermined

by the courts below, and we make no determination or intimation concerning the merits of these issues or as to other remedies or relief than that in the judgment before us.”

The Mandate from the Supreme Court [R. 2304] reads:

“And it is further ordered that this case be, and the same is hereby, remanded to said District Court for proceedings in conformity with the opinion of this Court.”

This mandate was dated June 23, 1947. The record shows 9,194 pages of proceedings since the mandate was filed in the District Court—during all of which proceedings appellants have appeared, either generally or specially.

Appellants’ efforts to secure dismissal in the Supreme Court, also in their application for a writ of prohibition, failed. In *Ex parte Fahey*, 332 U. S. 258, 260, the Supreme Court said:

“Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him.”

IV.

**The Apparent Aim of Appellants Is to Start a New
“Run” of Depositors to Withdraw Their Accounts
From the Association and Thus to Wreck It.**

The Association was organized in 1934 and operated under the same management at all times except for the period it was under the control of the “Conservator.”

Prior to its seizure it had increased its assets from approximately \$7,500.00 to approximately \$26,000,000.00 at the time of seizure [R. 87, 45-46, 4168] and this is not denied. It had uniformly and consistently paid dividends and built up surplus, reserves, and undivided profits of \$1,300,000.00 [R. 7]. This is not denied.

Following the appearance of the appellant Ammann as the purported “Conservator,” withdrawals ran as high as \$2,000,000.00 per day and at the end of five days reached a total of between 6 and 7 millions of dollars [R. 30, 107]. At the time he took over, Ammann stated [R. 117] “If it gets in the papers we are here, it will tear down the institution because we are here.” Ammann also stated [R. 118] “If it gets in the paper we are here, it will create a run and tear down the institution; that’s why we are here.”

The run by the depositors continued until approximately \$10,000,000.00 had been withdrawn under the tender management of the Conservator. When the 3 Judge Statutory Court ordered the restoration of the Association to its management, the deposit immediately increased and when the Conservator was again restored, they drop-

ped at least \$1,000,000.00 almost immediately. Since the management has been operating the Association, following the order of the Court on January 23, 1948 [R. 8310-8327] pursuant to the Board Order No. 388 dated January 17, 1948 [R. 8310], the Association has again approached a normal and healthy growth which no doubt would have been continuous had it not been for the interference of the appellants and their "Conservator." As a result of the retarding of its growth by the appellants, the assets of the Association would no doubt today be many millions of dollars greater than they now are. It is a well known fact that any publicity even suggesting a lack of financial stability will immediately impair the status of such an institution. By the Board's Order No. 2015, the subject of the injunction with which this appeal is concerned, it is obvious that the appellants desire to parade before themselves various insinuations of bad management on the part of the officers and directors of the Association and thus start another run, which, in view of their past actions, might well this time actually wreck the Association. Fortunately, it is solvent and prosperous in spite of the mismanagement of appellant Ammann. It would be a calamity were the appellants permitted to conduct such a mock hearing with themselves as the complainants, witnesses, prosecutors, judges and Court of final appeal. Were it not for the insistence of the appellant Board and its members of their right to conduct such a mock proceeding, we, who have grown up in the American tradition of fair play, would say: "It can't happen here."

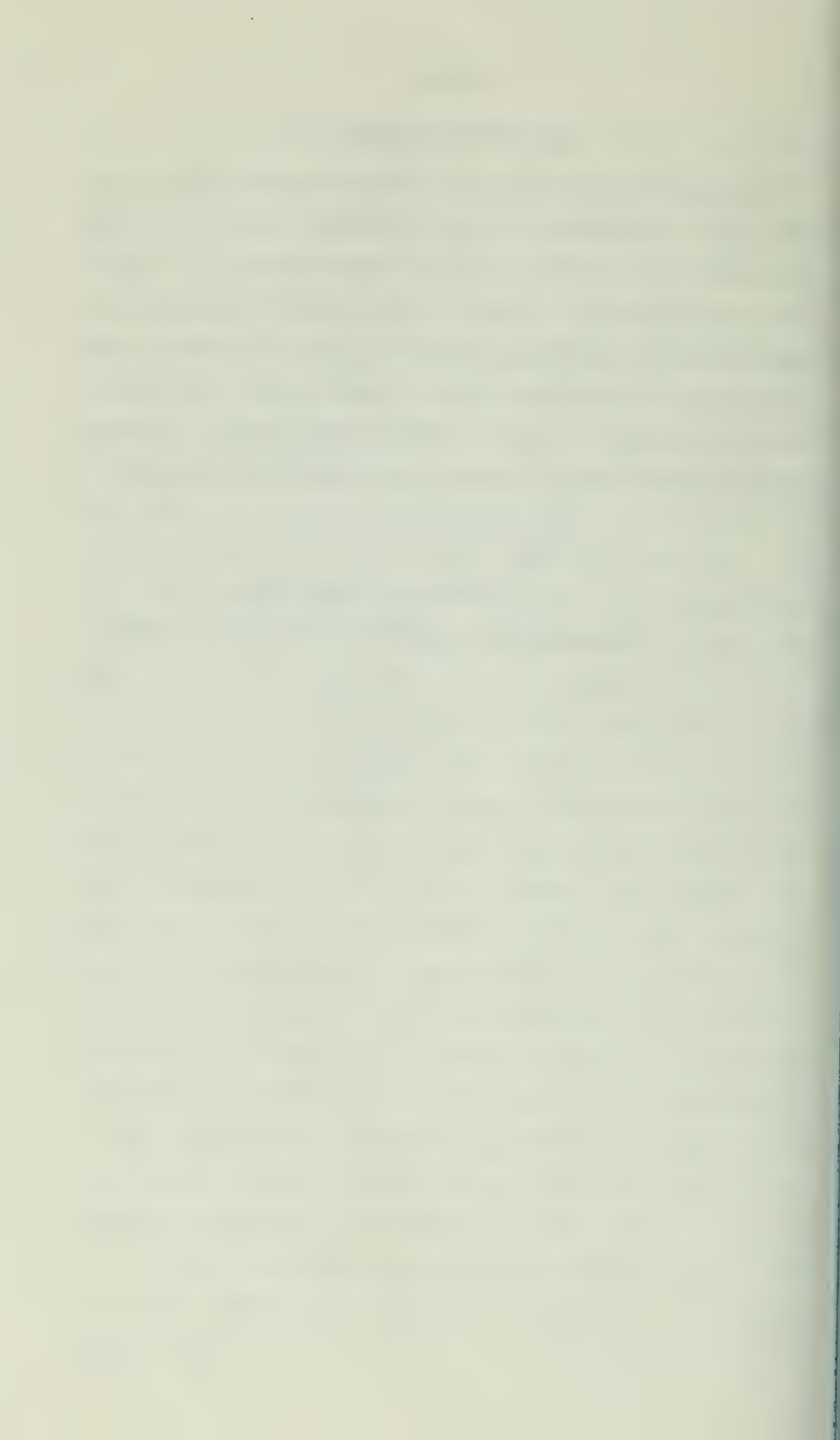
CONCLUSION.

Appellants have singularly failed to present any argument as to conflicting or any contrary evidence or lack of evidence to support any of the Court's findings. Appellants have failed to analyze the evidence presented at approximately one hundred hearings as set forth in the Transcript of Record herein of 11,498 pages. The appellant's law points being untenable, the appeal is without merit and the order appealed from should be affirmed.

Respectfully submitted,

RAYMOND TREMAINE,

Attorney for Appellee Robert H. Wallis.



No. 12511
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, SHAREHOLDERS PROTECTIVE COMMITTEE
OF LONG BEACH ASSOCIATION, LONG BEACH FEDERAL
SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COM-
PANY, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY
et al.,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*

Appellees.

BRIEF OF APPELLEE, GEORGE TURNER.

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3233 East Anaheim Street, Long Beach 4, California,

Attorney for Appellee George Turner.

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Appellees.

BRIEF OF APPELLEE, GEORGE TURNER.

JURISDICTIONAL AND PRELIMINARY STATEMENT.

Appellee, George Turner, for the purpose of brevity, joins in and adopts portions of the brief of appellee, Long Beach Federal Savings and Loan Association, as to:

Description of litigation; Jurisdictional Statement; Statement of the Case; Scope of Review on Appeal from Preliminary Injunction; Immunity from Suit; Indispensable Parties; Conclusiveness of Findings; and Propriety of Preliminary Injunction.

Additional treatment of the jurisdiction of the Court in this case as well as questions presented in appellants' brief, will be found in the argument hereinafter set forth.

FURTHER STATEMENT OF THE CASE:

For the convenience of the Court, this statement will be set forth in two parts:

- (1) Proceedings prior to the motion for the Injunction on appeal, and
- (2) Proceedings on the motion for injunction.

PROCEEDINGS PRIOR TO MOTION.

Prior to the 8th day of May, 1946, the appellee Long Beach Federal Savings and Loan Association had been using a portion of its building at 332 American Avenue, Long Beach, California, consisting of a lobby and the second and third floors of its three-story building, together with a parking lot in the rear of the building, for the purpose of conducting a hotel as part of its activities. In order to divorce itself of this foreign business adventure, the directors on the 8th day of May, 1946, by resolution authorized its officers to enter into a lease with appellee George Turner, whereby it leased to him the lobby of the Hotel Rolston and the second and third floors of the building, together with the parking lot in the rear of the building, for a term of twenty years, commencing on the 8th day of May, 1946, at a rental basis of fifty per cent of the net proceeds from said property after the payment of expenses, costs and charges. Said lease entitled the lessee to the use of the hotel equipment, furniture and fixtures as were then in said hotel and provided that any replacement made by the lessee should become the lessee's property. The lease further provided that the "lessor" (intended to be lessee) could at his option convert any part of the building to business purposes or business rentals and make such alteration and repair as may from

time to time be necessary or convenient to use said building for such purposes as lessee may from time to time determine. Said lease further provided that lessee should pay the taxes on all personal property owned by the lessee and used for the operation of said leased premises and should further pay the personal property taxes on property owned by the lessor and used by the lessee under said lease. Said lease is fully set forth at R. 3489-3491. Pursuant to said lease, the said George Turner went into possession of said premises and has continued in said possession ever since said date. That on May 20, 1946, appellant Ammann seized possession of appellee Long Beach Federal Savings and Loan Association, claiming to be appointed as conservator thereof by appellant John H. Fahey (on January 23, 1948, he was removed as such conservator by Order of the Court below, which order has become final from lack of appeal therefrom). That on July 12, 1946, subsequent to his taking possession of Long Beach Federal Savings and Loan Association, appellant A. V. Ammann, claiming to act as conservator, notified Appellee George Turner, by registered mail, to the effect that the lease dated May 8, 1946, between the Long Beach Federal Savings and Loan Association, as lessor, and Turner, as lessee, and covering the property hereinabove described, was not recognized by the appellant Ammann as conservator of the Long Beach Federal Savings and Loan Association, as a valid lease and accordingly Turner was directed to surrender said property immediately and to make an accounting for all income of any kind whatever received by him in connection with the operation of said property. Said letter was signed "Long Beach Federal Savings and Loan Association by A. V. Ammann, Conservator." A photostatic copy of

said letter is shown in Appendix "A," *infra*. Appellee Turner reported the receipt of the cancellation of his lease to the officers of the Long Beach Federal Savings and Loan Association and was advised by said officers that A. V. Ammann as Conservator, had no authority to make any demand of any kind or nature for and on behalf of said Association and he was warned that any payments made to Ammann, or any action taken by him, would not be recognized by the Long Beach Federal Savings and Loan Association and that the same would be made or taken at Turner's own peril. Thereafter by reason of the demands by conservator Ammann, on the one hand, insisting that the lease was cancelled and that payments thereunder be made to him, and the representations of the Long Beach Federal Savings and Loan Association, on the other hand, insisting that the lease was valid and demanding that no payments be made to Ammann, appellee Turner refrained and desisted from the making of any payments provided to be made under the provision of the lease and impounded all money due the Long Beach Federal Savings and Loan Association in a trustee bank account in his own name. Conservator Ammann, for approximately a period of twenty months thereafter, brought no action for the adjudication of the dispute, either looking toward the cancellation of the lease or for the collection of the moneys due thereunder, or over the dispute between the Long Beach Federal Savings and Loan Association and Ammann, notwithstanding the fact that Ammann was authorized to "institute, prosecute, maintain, defend, intervene and otherwise participate in any and all actions, suits or other legal proceedings by and against the conservator or association." (Code of Federal Regulations, Title 24, Part 149, section 149.5(f)).

That on the 16th day of January, 1948, just one day prior to the adoption on January 17, 1948, of appellants Home Loan Bank Board Resolution No. 388 [R. 8231-8232, Footnote 7], which by its terms repealed Federal Home Loan Bank Administration Order No. 5254 under which Ammann was appointed as conservator for the defendant Long Beach Federal Savings and Loan Association, an action was filed in the Superior Court of the State of California, in and for the County of Los Angeles, known as Case No. LBC-14492 [R. 9585-9645] wherein Harold Lee Newendorp and Charles E. Bradley, claiming to represent all of the depositors in appellee Long Beach Federal Savings and Loan Association, were plaintiffs and T. A. Gregory and others, including appellee George Turner, were defendants. In said State Court action the plaintiffs, Newendorp and Bradley, among other things, set forth that no part of the rental under the aforesaid lease had been paid to the Long Beach Federal Savings and Loan Association and that said Association was entitled to said rentals then due and unpaid. Said complaint on behalf of Newendorp and Bradley also asked for cancellation of the lease as fraudulent and for damages in a specified amount [R. 9585-9645].

Pursuant to the adoption of Home Loan Bank Board Resolution No. 388 on January 17, 1948, petition was filed with the Federal Court by plaintiffs the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association for an order restoring the possession and control of said Association to its duly elected Board of Directors. Pursuant thereto on January 23, 1948, the Court made its order for the restoration of the control of the property, assets and management

of said Association to its said officers and directors to be effective as of noon January 24, 1948.

It appears that the action filed on behalf of Newendorp and Bradley on January 16, 1948, which contained, among other things, the same specific charges made by conservator Ammann in his earlier letter of demand, dated July 12, 1946, hereinabove referred to, was the complaint of Ammann, or at least a parting shot by conservator Ammann by reason of the fact that at some time between January 17, 1948, and January 24, 1948, said conservator Ammann fled the jurisdiction of the California Federal Court and has not been within the jurisdiction of said Court since said date. It also appears that the same identical charges made in said complaint [R. 9585-9645] against the appellee Turner, are contained in the More Definite Statement shown in R. 8218-8224, Footnote 4.

Subsequent to the filing of the Newendorp-Bradley action, an application for a receiver for the hotel property was made to the Superior Court. Appellee Turner was shortly thereafter served with summons and complaint on behalf of the Plaintiffs, Shareholder Members Protective Committee and notified not to acquiesce in the cancellation of the lease. Appellee Turner joined in the motion of appellee Title Service Company, a corporation, for the removal of the Superior Court action to the District Court by reason of the many conflicting jurisdictional matters and in order to avoid a multiplicity of suits.

On the 29th day of January, 1948, appellee Turner filed his answer and cross-claim in interpleader in Action No. 5421 PH, including Consolidated Case No. 5678 WM [R. 3461-3491] and interplead in the District Court the

sum of \$11,515.87 as rental accrued under said lease to and including January 1, 1948 [R. 3467-3468]. Subsequently, two supplemental cross-claims in interpleader were filed on behalf of appellee Turner in which the additional sums of \$1,380.84 and \$5,606.81 were deposited in the Registry of this Court [R. 3872-3876 and R. 8138-8141].

On the 16th day of April, 1948, appellee Turner filed in the District Court his answer and cross-claim to the action of Newendorp and Bradley which still remains on file unanswered [R. 9963-9998]. The answer and cross-claim in interpleader of appellee Turner, in addition to setting forth the amount of rent accumulated and the tender of said amount into Court, asks for the adjudication of the validity of his lease and requests that further proceedings in the Newendorp-Bradley action in the Superior Court of the State of California, in and for the Court of Los Angeles, be stayed until the termination of the litigation in the District Court.

The lease of the hotel property executed by the Long Beach Federal Savings and Loan Association in favor of appellee Turner is made a part of the appellants' More Definite Statement of May 29, 1946 [R. 8218-8224, Footnote 4], wherein it is charged that the officers of the Association executed a purported lease of the hotel property to one George Turner for a twenty year period on terms which, in effect, would give to the said Turner the use of said property without adequate consideration therefor to the said Association. It also appears that under Home Loan Bank Order No. 2015 dated September 9, 1949, the same complaint is incorporated by reference in Paragraph 4 thereof [R. 8242-8247, Footnote 11]. Paragraph 4 states, in effect, that the Association

and its officers have committed and are committing other violations of law and regulations, including violations set out in the More Definite Statement submitted to said Association on May 29, 1946, and have pursued and are pursuing a course that is jeopardizing and injurious to the interests of its members, creditors and the public. It therefore appears that the validity of appellee Turner's lease is still a matter of dispute and is used as a basis of Home Loan Bank Order No. 2015.

The validity of appellee Turner's lease is still pending before the District Court and is involved as part of the conservator Ammann's accounting. The District Court, by reason of its Preliminary Injunction and Order of Remand, on the 2nd day of February, 1949 [R. 8377-8398], stayed all proceedings concerning the validity of the lease or the rent deposited except by proceedings before said District Court.

While it is true that appellee Turner is not named as a party in Home Loan Bank Board Order No. 2015, it appears that the question of the validity of his said lease would be raised, particularly in view of the fact that the order provides "that any person, partnership, association, or corporation claiming to have an interest in the subject matter involved may, at any time before the closing of the hearing, file with the Presiding Officers a petition for leave to intervene at said hearing" [R. 8245, Footnote 11].

It would therefore appear that appellee Turner would necessarily, in order to protect his said lease from the

claims of the Home Loan Bank Board at the Administrative Hearing, be compelled to travel some 3,000 miles and, without the assistance of the Court or his counsel, take his chances on an adjudication by an Administrative Board as to the validity of his lease and be placed in jeopardy as to rents and profits heretofore interpleaded in the District Court. Appellee Turner is unwilling to have the validity of his lease adjudicated in his absence, particularly by a party litigant, namely, the Home Loan Bank Board who through its representative, A. V. Ammann, heretofore attempted to cancel it.

PROCEEDINGS ON MOTION FOR INJUNCTION.

On October 17, 1949, appellee George Turner filed his motion for issuance of a temporary restraining order to restrain the Administrative Hearing before the Home Loan Bank Board pursuant to said Order 2015 of said Board, dated September 9, 1949, together with proper affidavits and points and authorities [R. 7676]. The motion set forth that George Turner was the person named in the More Definite Statement of the Home Loan Bank Board under date of May 29, 1946, and which said More Definite Statement was again referred to in the Home Loan Bank Order No. 2015 of September 9, 1949. Said motion asked that the District Court issue a temporary restraining order enjoining and restraining each and every party to this action individually and in their official capacity from further proceeding

with the Administrative Hearing, set for October 25, 1949, in Washington, D. C.

The motion set forth that appellee Turner had deposited in the Registry of the District Court the sum of \$12,896.71, being the rentals due to and including February 28, 1948, under his lease with the Long Beach Federal Savings and Loan Association, and that the rentals and validity of the lease were made a part of said More Definite Statement of May 29, 1946, and referred to in Paragraph 4 of appellant Home Loan Bank Board Order No. 2015 of September 9, 1949.

The motion further set forth that parties to the action were prohibited, enjoined and restrained by order of the Court dated February 2, 1949 [R. 8377-8398], from proceeding with said litigation or any part thereof in any proceeding other than in the Federal District Court. The Motion pointed out that the intervention and appearance of appellee Turner before said Administrative Hearing proposed to be conducted by the Home Loan Bank Board pursuant to said Order No. 2015 of September 9, 1949, would be in direct violation, disregard and in contempt of said District Court's order of February 2, 1949. Said motion further set forth that, unless restrained, the Home Loan Bank Board would proceed with the Administrative Hearing, evidence would be taken against him in his absence and findings would be made therein which would be prejudicial and detrimental to him. The motion further recited that appellee Turner was

made a party defendant to this litigation through no choice of his own and that he subsequently and in good faith filed his cross-claim in interpleader, submitting himself to the jurisdiction of the District Court in order that all matters and controversies between the various parties, and particularly the matters set forth in the More Definite Statement heretofore referred to, could be tried on their merits before a Court having jurisdiction of the parties and the subject matter. Further attention is called to the fact that to allow the hearing would result in a multiplicity of actions and hearings, all of which would be contrary to, and in violation of, the interpleader jurisdiction of the District Court and its orders heretofore made herein and thereon and would result in great and irreparable damage to appellee Turner for said hearing to attempt to adjudicate his rights in and to said lease and appoint a receiver over the subject matter of the litigation in his absence.

After a hearing in Court, the Court rendered an oral opinion which appears at R. 11146-11164 and granted the Preliminary Injunction at R. 8194-8540.

ARGUMENT.

Appellant contends that the cross-claim of Turner is “even more specious”, having been filed on January 29, 1948 and after the termination of the conservator’s appointment and therefore the rental payment could have been safely paid to the Association, without any risk of double liability, since no dispute then existed as to who was entitled to represent the Association. Taking this statement on its face, it would appear that appellant’s position was sound. However, on January 16, 1948, and prior to the order of January 23, 1948, restoring the possession and control of Association to its officers and directors, appellee Turner was made a party defendant in a civil action in the Superior Court of the State of California, in and for the County of Los Angeles, known as Case LBC-14492 [R. 9585-9645], brought by Harold Lee Newendorp and Charles E. Bradley, claiming to represent the class of all depositors in appellee Long Beach Federal Savings and Loan Association. In said action, the question of rentals and validity of the lease was again questioned and said complaint demanded damages and the appointment of a receiver for the leased hotel premises.

Immediately following the filing of the Newendorp action, appellee Turner was made a party defendant in the original shareholders class action, filed in the District Court in 1946, two years before. Appellee Turner filed in the U. S. Court, his answer and cross-claim in interpleader, depositing the sum of \$11,515.87 and subsequently filed a first and second supplemental cross-claim in interpleader, depositing additional sums [R. 3872; 8138].

Appellee Turner also joined in the motion of appellee Title Service Company for removal of the State Superior Court Action to the District Court and was one of the movants in obtaining a restraining order against further proceedings in the Superior Court [R. 8377-8398].

The factual information contained in the Superior Court Action of Newendorp and Bradley was peculiarly within the knowledge of conservator Ammann and was contained for the most part in that certain "secret" document known as Exhibit "C" for identification, designated as Docket No. 2905, Reports and Audits of the Long Beach Federal Savings and Loan Association [R. 8265], which was first made available to the movants for the preliminary injunction at 10:30 o'clock P. M. on November 7, 1949, the date of the hearing of the subject preliminary injunction. How this so-called factual information was apparently made available to Newendorp and Bradley for a foundation in bringing the Superior Court Action on the eve of Ammann's fleeing the jurisdiction of the U. S. District Court is another of the unexplained mysteries of this involved litigation. The answer rests with former conservator Ammann.

QUESTION: WHOSE ACTION IS "EVEN MORE SPECIOUS"?

Appellants made no response to appellee, Turner's motion for Issuance of Preliminary Injunction [R. 7686] which, among other facts, set forth the following:

"III

"That unless permanently enjoined, the defendants Home Loan Bank Board and the individual members thereof, will proceed with the administrative hearing of October 25, 1949, which said proceedings would be an attempt to invade and usurp the juris-

diction of this Court, contrary to the orders thereof, and in violation of those certain orders of this Court prohibiting all parties thereto and each of them from litigating, appearing in, or participating in, any proceedings in any forum other than this United States District Court.”

By their failure to deny the facts set forth in said Motion, particularly the facts hereinabove quoted, appellants admit that the proposed administrative hearing would invade and usurp the jurisdiction of said District Court.

INTERPLEADER JURISDICTION.

The jurisdiction and right of appellee Turner to interplead in order to avoid double liability and multiplicity of actions is set forth in the following decisions:

Treinies v. Sunshine Mining Co., 308 U. S. 66,
84 L. Ed. 85 (1940)

affirming Ninth Circuit. In this case the Supreme Court held:

“By the act of January 20, 1936 (Old Title 28, U. S. C. Sec. 41 sub. 26), the District Courts have jurisdiction of suits in equity, interpleading two or more adverse claimants, instituted by complainants who have property of the requisite value claimed by citizens of different states. The suit may be maintained ‘although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another’ . . .” (Citation to Title 28 U. S. C. added.)

The Court further held:

“Process may run at least throughout all the states. Neither are the provisions of Sec. 265 of the Judi-

cial Code 28 U. S. C. A. 379 applicable. That section forbids a United States court from staying proceedings in any state court. The Interpleader Act passed subsequently, however, authorizes the enjoining of parties to the interpleader from further prosecuting any suit in any state or United States court on account of the property involved. Such authority is essential to the protection of the interpleader jurisdiction and is a valid exercise of the judicial power." (Emphasis added.)

In refusing to permit re-litigation of jurisdiction when the judgments of the state court had become final, the Supreme Court said:

"One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues', as well to jurisdiction of the subject matter as of the parties. (Citing authorities.)" (Emphasis added.)

The broad powers of a Court of equity to protect its interpleader jurisdiction, particularly to preserve the integrity of its final judgments from violation by a defeated litigant, are shown in the case of:

Dugas v. American Surety Co., 300 U. S. 414; 81 L. Ed. 720 (1937).

In the above case the Court found that a new State Court action against the different defendants, was in contravention of the spirit, if not the letter, of the decree in the interpleader suit. The Court in affirming the injunction, quoted the interpleader statute, on which it based its decision:

"Section 2. . . . Notwithstanding any provision of the Judicial Code to the contrary, said court shall have power to issue its process for all such

claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any Federal Court . . . until the further order of the court; which process and order of injunction shall be returnable at such time as the said court or a judge thereof shall determine and shall be addressed and served by United States marshals for the respective districts wherein said claimants reside or may be found.”

Railway Express v. Jones, 106 F. 2d 341; (C. C. A.-7 1939).

The above case held that where the possessor of funds can establish the essential and jurisdictional facts prescribed in the statute, his right to interpleader relief under the section is absolute.

The Courts have even held that diversity of citizenship is not a requirement for an interpleader action. The Courts have held that the reason for interpleader is not negatived by the fact that the claimants to the fund are of the same state. The usefulness of the proceedings is in the protection of the party against conflicting claims, and jurisdiction is laid by the allegation or complaint. A controversy of this nature is settled by the sensible process of bringing all parties into one Court proceeding.

Rosetti v. Hill, 162 F. 2d 892 (C. C. A.-9, 1947);

Security Bank v. Walsh, 91 F. 2d 481 (C. C. A.-9 1937).

The latter was a case wherein plaintiff, a British corporation, sued conflicting claimants who are all citizens of California. Objection was made to the jurisdiction and the Court of Appeals for the Ninth Circuit held that

jurisdiction existed notwithstanding the lack of diversity of citizenship. The statutes on interpleader were intended to afford a remedy in situations where interpleader had theretofore been unavailable because of the impossibility of bringing before a Court, claimants residing beyond its territorial jurisdiction.

Cramer v. Phoenix, etc., 91 F. 2d 141 (C. C. A.-8 1937).

In affirming interpleader jurisdiction the Circuit Court held:

“It is elementary that where one court takes jurisdiction of a specific thing, the *res* is as much withdrawn from the judicial power of another as if it had been removed to a different territorial sovereignty. The tribunal whose jurisdiction first attaches, holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted . . . It appears that the proceeds of the two policies were deposited in the registry of the lower court. In these circumstances that court had exclusive jurisdiction and power to hear and determine all questions respecting title, possession, and control of them”

Maryland Casualty Co. v. Glassell-Taylor, 156 F. 2d 519 (C. C. A.-5 1946).

In this case the Court held that the Federal Rules of Civil Procedure were not designed merely to prevent a multiplicity of suits and protect the stakeholder from multiple liability but they were also intended to require all interested parties to come in and set up their claims in one case. The interpleader statute was also designed to afford a means of process by which claimants who live in other states, may be called in and required to litigate in one Court to the end that all claimants to the

fund, as well as the holder of the fund, may be given protection.

United States v. Sentinel Ins., 178 F. 2d 217 (C. C. A.-5 1949).

In the above case, seven insurance companies commenced interpleader against the Collector of Internal Revenue, federal receivers and various other claimants. Appellants maintain that because some of the claimants were of the same citizenship as others, the interpleader jurisdiction was thereby defeated. However, the Court held that even if the plaintiffs in the interpleader suit had been dismissed before final decree, the requirements of the statute would be met if there were two or more claimants who were citizens of different states, regardless of how many claimants there might be who were citizens of the same state with other claimants. This case cites the case of *Dugas v. American Surety Co.*, *supra*.

JURISDICTION GENERALLY.

The District Court not only accepted but had jurisdiction from the inception of the litigation and still retains such jurisdiction.

The combined and consolidated actions before the Court affect assets located in California in excess of \$100,000,000.00. There has been interpleaded into the Registry of the District Court, approximately \$14,000,000.00 in various assets and there are conflicting claims filed thereto, as well as disputes and questions affecting the title to real and personal property, including the leasehold interests of appellee Turner, all of which assets are within the jurisdiction of said District Court, which clearly establishes the interpleader jurisdiction (Rule 22 F. R. C. P;

28 U. S. C. Sections 1335, 1397 and 2361—formerly 41(26) of Title 28 U. S. Code).

There is a diversity of citizenship between the various parties to the action. There are interpretations of federal laws, rules and regulations, and numerous constitutional questions involved, as well as titles to real and personal property in the pending litigation, which cannot be determined other than by Court procedures, certainly not by an administrative hearing where the board is complainant, prosecutor, judge and jury.

In rem jurisdiction has been established in said District Court pursuant to Section 1655 (formerly section 118) Title 28 U. S. Code.

The District Court has repeatedly held that it has jurisdiction of the parties by reason of various orders [R. 5275], including Exhibits “A”, “D”, “E”, “F” and “H” [commencing at R. 8310 and ending at R. 8398], some of which were appealed from and later dismissed, and others on which the appeal time has long since expired [R. 8268]. The District Court, having thus obtained jurisdiction in equity and in interpleader, had the right to protect the integrity of its previous findings and judgments and decrees.

Appellee particularly calls attention to Exhibit “E”, *supra* [Preliminary Injunction Enjoining Prosecution of Remanded Action and Order of Remand, R. 8377], and hereinafter quotes certain provisions of the Order as found on [R. 8398]:

“It Is Further Ordered that all parties to said remanded action be and they hereby are enjoined and restrained from prosecuting in any other proceeding in or connected with said remanded action

numbered L. B. C.-14492 in the Superior Court of the State of California, in and for the County of Los Angeles until the final judgment in the litigation pending in this entitled court, in Case No. 5421-P. H. and its consolidated Case No. 5678-P. H., or until further order of this above-entitled Court.

“During the period this Injunction and Restraining Order shall remain in effect, none of the parties affected thereby are restrained or enjoined from taking any or all actions or proceedings which they or any of them may deem appropriate in the above-entitled proceedings and before this Court but not otherwise.”

As heretofore pointed out, no appeal was taken from said Preliminary Injunction and Order of Remand, and the same is final. From the foregoing Order it appears that appellee George Turner was enjoined and restrained from prosecuting in any other forum except the said District Court.

Looney v. East Texas Rwy. Co., 247 U. S. 216; 62 L. Ed. 1084 (1918);

Julian v. Central Trust Co., 193 U. S. 93; 48 L. Ed. 629 (1904).

A similar case in point is the *City of Orangeburg v. Southern Railway Co.*, 134 F. 2d 890 (C. C. A.-4, 1943).

This case held in affirming the injunction to prevent seizure of possession of property the subject of litigation in Federal Court, said at page 892:

“ . . . under the established rule set out in *Kline v. Burke Const. Co.*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077, and many other decisions, the court, state or federal, which first acquires jurisdiction of the subject matter of a suit in rem holds it to the exclusion of any other

court until its duty is fully performed, and to that end may enjoin the parties from proceeding in any other court when the effect of the action therein would be to defeat or to impair its own jurisdiction”

ANSWER TO LACK OF JURISDICTION OVER INDISPENSABLE PARTIES.

Appellants contend that by reason of the fact that they are government agencies or members thereof, that their actions are beyond the review of any Court and that they are immune from suit. It is conceded that the Federal Home Loan Bank of San Francisco and Federal Savings and Loan Insurance Corporation are both “sue or be sued” corporations. Likewise, Code of Federal Regulations, Title 24, Part 149, Section 149.5 “Powers and Duties of Conservator”, Subsection (f) provides that a conservator may sue and be sued.

The doctrine of immunity is not favored by Congress or the Courts. *Land v. Dollar*, 330 U. S. 731; 91 L. Ed. 1209 (1947); *Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381; 83 L. Ed. 784 (1939); *Federal Housing Administration v. Burr*, 309 U. S. 242, 84 L. Ed. 724 (1940); *Reconstruction Finance Corp. v. Menihan*, 312 U. S. 81; 85 L. Ed. 595 (1941).

It is contended by appellee Turner that any immunity, if it ever did exist, was waived and abandoned by the general appearance of appellants Home Loan Bank Board and its members upon the filing in the District Court of its Order No. 388 [R. 3404] which removed the conservator under Court Order.

The attitude of Congress towards the agencies’ immunity from suit is expressed by Subdivision (c) of

Section 10 of the Administrative Procedure Act (Title 5, U. S. C. Sec. 1009), which provides that every agency action made reviewable by statute, and every final agency action from which there is no other adequate remedy in any Court shall be subject to judicial review. It would therefore appear that if there is no other adequate remedy for judicial review, the Administrative Procedure Act creates one.

In the case of *Reconstruction Finance Corp. v. Menihan*, 312 U. S. 81, 85 L. Ed. 595, the Court held:

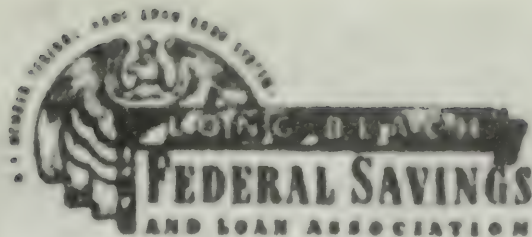
“ . . . starting from the premise indicated in the Keifer case (supra) that waivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities—that being in line with the current disfavor of the doctrine of governmental immunity—we concluded that in the absence of a contrary showing ‘it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to “sue and be sued” that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.’ ”

Conclusion.

For foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

F. HENRY NECASEK,
Attorney for Appellee George Turner.



328 AMERICAN AVENUE • TELEPHONE 712-03
LONG BEACH 2, CALIFORNIA

July 12, 1946

Mr. George Turner,
340 East Fourth Street,
Long Beach 2, California.

Dear Sir:

This is to notify you that the purported lease dated May 8, 1946, between Long Beach Federal Savings and Loan Association, as lessor, and you as lessee, and covering property known as

The lobby of the Hotel Rolston located at 332 American Avenue, Long Beach, California, and the second and third floors of the three story building occupying the property described as Lots 14 and 16, Block 78, Long Beach Townsite, together with the parking lot in the space upon said lots not occupied by the now existing building,

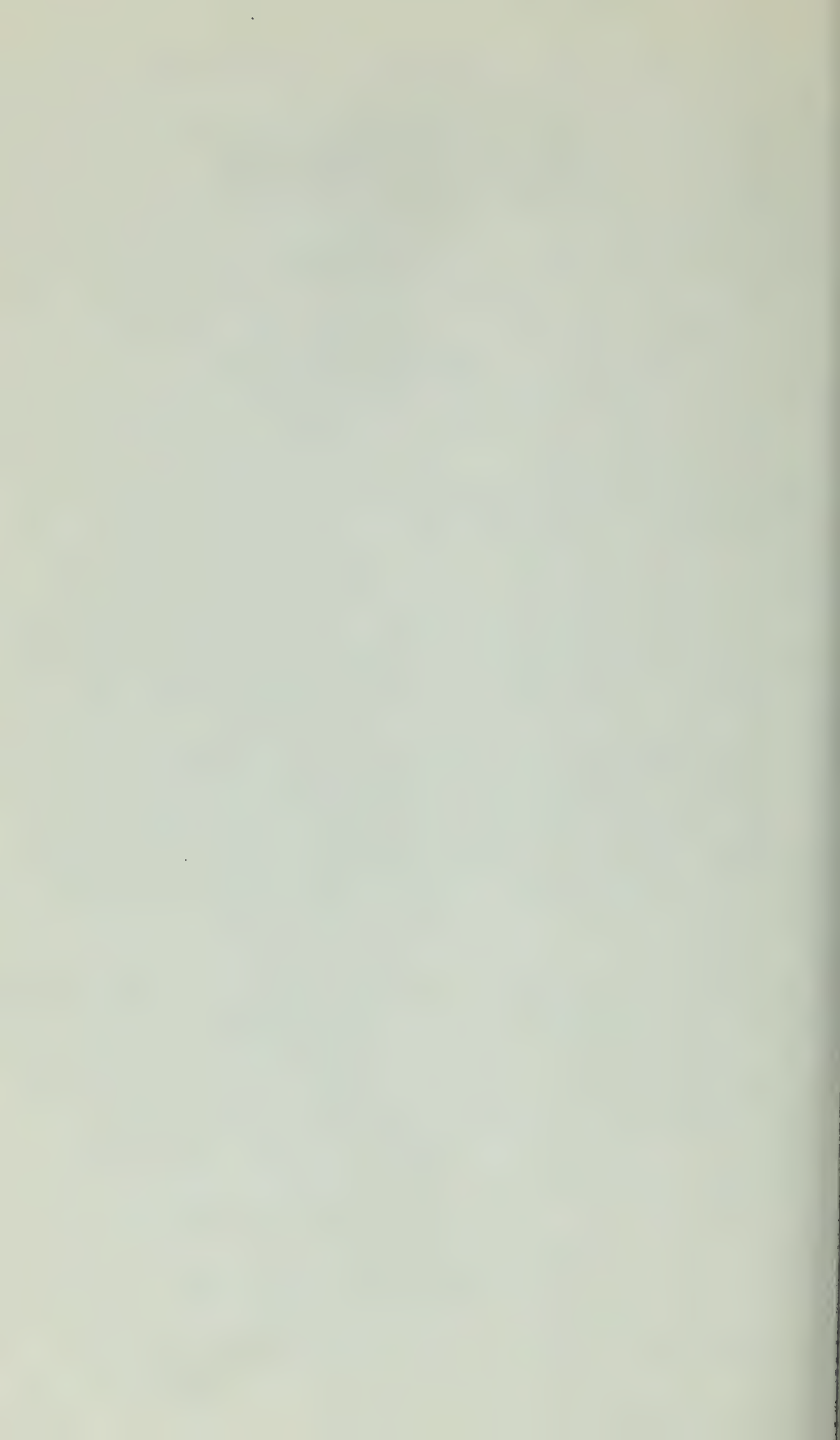
is not recognized by the Long Beach Federal Savings and Loan Association as a valid lease. Accordingly you are hereby directed to surrender said property immediately and to make an accounting for all income of any kind whatever received by you in connection with the operation of such property.

Very truly yours,

LONG BEACH FEDERAL SAVINGS
AND LOAN ASSOCIATION

By *A. V. Ammann*
A. V. Ammann
Conservator

Registered Mail
Return Receipt Requested



No. 12,511

IN THE

United States Court of Appeals
For the Ninth Circuit

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K.
LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND
LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN
BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V.
AMMANN and GEORGE K. BRAMLEY, *Appellants,*

VS.

PAUL MALLONEE, et al., *Appellees.*

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al.,
Appellants,

VS.

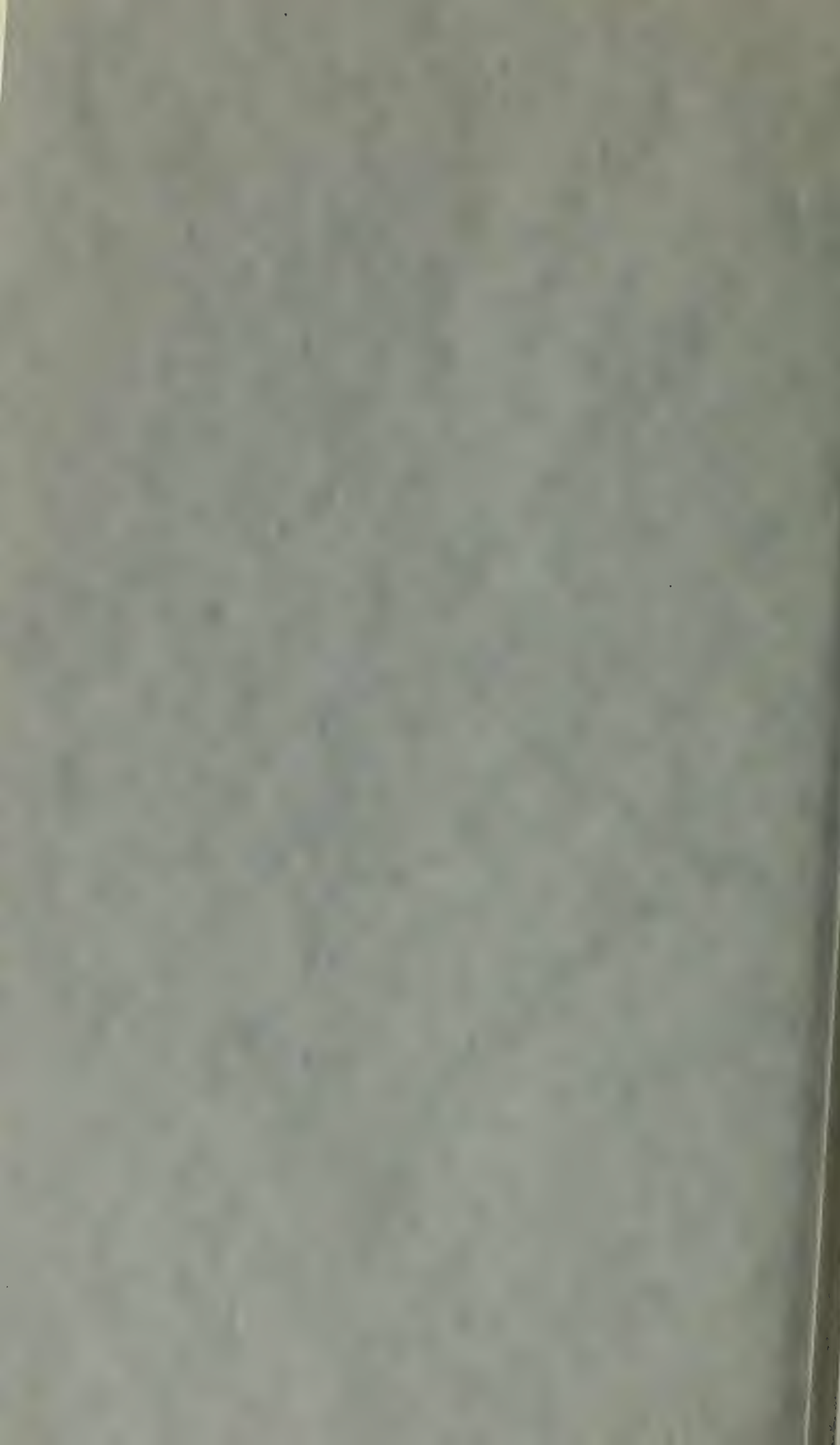
FEDERAL HOME LOAN BANK OF LOS ANGELES, et al.,
Appellees.

On appeal from the District Court of the United States
for the Southern District of California,
Central Division.

REPLY BRIEF FOR APPELLANTS.

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Of Counsel.



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No. 12,511

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K.
LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND
LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN
BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V.
AMMANN and GEORGE K. BRAMLEY,

Appellants,

VS.

PAUL MALLONEE, et al.,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al.,

Appellants,

VS.

FEDERAL HOME LOAN BANK OF LOS ANGELES, et al.,

Appellees.

On appeal from the District Court of the United States
for the Southern District of California,
Central Division.

REPLY BRIEF FOR APPELLANTS.

Eight briefs, totaling over 600 pages in length, have been filed by appellees, seven of them by the Long Beach Association and affiliated interests, and one by the former Los Angeles Bank and certain of its former member associations. In the interest of

brevity, the brief of the Association will be identified as "Ass'n Br."; that of the Association shareholders as "Sh. Br."; that of appellee Wallis as "Wal. Br."; that of Turner as "Tr. Br."; that of the so-called "Home Owners" (borrower-intervenors) as "HO Br."; that of the Wilmington Association as "Wil. Br."; that of Title Service Co. as "T. S. Br."; and that of the Los Angeles Bank as "L. A. Br."

The appellants' opening brief will be identified as (Op. Br. 4):

SCOPE OF REVIEW ON APPEAL FROM INTERLOCUTORY INJUNCTION.

All parties are agreed that, on review of an interlocutory injunction, the appellate court must decide both whether the pleadings set forth any claim for relief and whether the trial court had jurisdiction of the subject matter and the parties involved. Thus the brief of the Association shareholders expressly states (Sh. Br. 4):

"On an appeal from a Preliminary Injunction the Appellate Court need decide only three issues:

First: Did the trial court have jurisdiction?

Second: Were there allegations in the pleadings sufficient to sustain any relief?

Third: Was the issuance of a Preliminary Injunction an abuse of the trial court's discretion?"

The Association's brief takes the same position (Ass'n Br. 56).

Accordingly, it is unnecessary to consider whether any objection to the maintenance of the action is “jurisdictional” or “substantive”, and all such objections may be described as the failure “to state a claim for relief within the jurisdiction of the court below”.

As the injunction on appeal was issued to restrain the maintenance of a separate proceeding in another forum, it must also be shown that there is an identity of issues between the action pending below and the proceedings enjoined. *Long v. Stites*, 63 Fed. (2d) 855; *Empire Trust Co. v. Brooks*, 232 Fed. 641. Appellees by implication admit as much, in asserting that the grounds of the Board order in controversy directly affect matters in issue before the court below (Ass’n Br. 43; L. A. Br. 36).

The questions to be considered on appeal from this interlocutory injunction are thus fourfold:

First. Is the action one within the jurisdiction of the court below?

Second. Do any of the pleadings state a claim for relief?

Third. To the extent, if any, that any of the pleadings state a claim for relief within the jurisdiction of the court below, is there an identity of issues between such claim and the proceeding restrained by the injunction on appeal?

Fourth. Apart from the foregoing, was the injunction improperly granted?

The seven briefs filed by the Long Beach Association and affiliated interests are directed principally to the first question, and primarily as it relates to the jurisdiction of the court below over the persons of the defendant and not of the subject matter of the action.

In none of the seven briefs is there a word of argument to show that the pleadings allege any ground for relief on the merits. The plaintiff shareholders make the bald assertion that "the complaints as amended state causes of action", supported only by a mere citation of the pleadings without argument or authority (Sh. Br. 9). The Association is content to say that "pleadings stating claims for relief have already been the subject of final judgments by the court below, the protection of which final judgments was one of the grounds for the issuance of the Preliminary Injunction" (Ass'n Br. 56). Indeed, the only theory ever advanced by these appellees throughout the entire proceeding is the one first announced by Judge Hall (22 R. 10294), and adopted by appellees (10 R. 4402), that "it is a fundamental rule that fraud vitiates from the beginning a transaction". The appellants' answer, among others, that neither "malice" nor "fraud" as pleaded by appellees affords any basis for recovery of money damages or the other remaining relief prayed for, set forth at length in our opening brief (Op. Br. 36-54), is nowhere even discussed by appellees.

On the question whether there is any identity of issues between the action pending below and the ad-

ministrative proceeding enjoined, appellees rest on a mere assertion (Ass'n Br. 43). The alleged identity of issues was sought to be supported in the court below by findings describing in detail the issues allegedly remaining for determination in the court below, including the "question of the validity of all the acts performed by said conservator during the period of his possession" (18 R. 8253-5), but the 309-page brief of the Association is wholly silent on the subject, possibly with the object of avoiding any argument on the merits of the complaints.

**THE QUESTIONS PRESENTED ON THIS APPEAL AND
APPELLATE RECORD PERTAINING THERETO.**

The issues on this appeal are few and narrow in scope.

Nothing need be considered other than the substantially identical shareholders' complaint and Association cross-claims.

The so-called cross-claims in "interpleader" of appellees, Title Service Company, Wallis, and Turner, are plainly impermissible collateral attacks (see Op. Br. 75-6). The same is true of the Association's attempted interpleader of the San Francisco and Los Angeles Banks to determine the ownership of \$6,300,000 of notes, evidencing a loan from the San Francisco Bank to the Association during the conservatorship, and collateral securing the same (see *infra* p. 27). The proceedings in intervention by "Home Own-

ers" (borrowers from the Association) are not only subject to the same objection but have been disposed of by final judgments not here in controversy, which judgments, however, expressly reserved all issues "without prejudice" as to all other parties (Op. Br. 85). There is obviously no basis for the Association's attempt to interplead its own shareholders and the Federal Savings and Loan Insurance Corporation to determine the amount of insurance premiums payable to the latter (Op. Br. 77-8). The separate actions of the ten "Northern Associations" in the United States District Court for the Northern District of California and of the two Association shareholders in a California State Court, as well as the proceedings below to enjoin those actions (Op. Br. 19-20), add to the length of the record but nothing to the issues on this appeal. And the proceeding to show cause why the San Francisco Bank should not be dissolved by vote of its Association shareholders, in which 300 member institutions were served, hardly merits serious consideration; the only right to vote conferred on the Bank's shareholders is the *statutory* right to elect a specified number of directors (Op. Br. 15, n. 18; 12 U.S.C. 1427; Op. Br. App. A, 119).

The issues raised by the shareholders' complaint and Association cross-claims are, in turn, narrow in scope. Before the Board Order No. 388 of January, 1948 and the ensuing court order of January 23, 1948, directing the return of the Association to its private

management, the objects of the complaint and Association cross-claims were, first, to secure the return of the Association and its assets, free from alleged clouds on title, and second, to nullify each and every transfer, contract or other act of the conservator and to recover damages therefor, through the medium of a purported accounting.¹ The first is no longer in issue, the Board having terminated the conservatorship. It is argued, to be sure, that the former conservator has not returned all of the Association's assets (Sh. Br. 19-20), but as it is nowhere alleged (and could not be) that he personally pocketed any of such assets during the conservatorship or on its termination, what is meant is merely that he allegedly made unlawful transfers or other disposition of the Association's assets and unlawfully incurred obligations on the Association's behalf.

Were it permissible to consider each and every act of the Conservator throughout the period of the conservatorship, none of the remaining relief prayed for could be granted. The order appointing the Conservator, having been made in the exercise of the Board's jurisdiction, was valid and enforceable until duly set aside or terminated (Op. Br. 36-42), and upon the termination of the conservatorship none

¹Both the complaint (Count VI, 7 R. 3064) and Association's cross-claims (Count IV, 7 R. 3309) also contain allegations concerning the validity of the administrative orders of March 29, 1946, dissolving the Los Angeles Bank, none of which states any claim for relief within the jurisdiction of the court below. See *infra*, p. 33.

of the obligations incurred by the Conservator on behalf of the Association may be set aside, and no money damages may be recovered from appellants, notwithstanding the allegations of "malice" or "fraud" (Op. Br. 42-54). All such relief is barred for the further reason that the Association failed to exhaust its administrative remedy within the time available therefor during the conservatorship; the courts cannot make an independent determination of the question whether the Conservator should have been appointed, for to do so would "substitute the courts for the administrative tribunal" (Op. Br. 56-58, see also, *Slocum v. Del. Lack. & W. R. R.*, 339 U.S. 239, 242-244; *Order of Ry. Cond. of America v. Southern Ry. Co.*, 339 U.S. 255; *Order of Ry. Cond. of America v. Pitney*, 326 U.S. 561, 566-7). The order appointing the Conservator, moreover, if reviewable at all, which we deny, is valid on the admitted facts (Op. Br. 59-71).

Any attempt to nullify the acts of the Conservator or to recover damages therefor, however, must be confined to the brief interval before opportunity for administrative hearing was accorded. Obviously, any action or damage complained of which occurred thereafter was susceptible of correction by an administrative remedy ignored by appellees, and cannot now be questioned in the courts (see Op. Br. 56-7). At most, therefore, this action concerns claims allegedly arising out of temporary operation of the conservatorship before hearing was afforded, claims based on,

(1) a run of \$10,000,000 allegedly caused by “statements” (7 R. 2984-5, 3220-5) of the Conservator making false charges against the Association’s management, a class of damage for which traditionally there is no redress, whether the communications complained of are those of a court, grand jury, or a federal administrative agency. (*Ewing v. Mytinger & Casselberry*, 339 U.S. 594; *Glass v. Ickes*, 117 F. (2d) 273);

(2) a loan of \$7,300,000 from the San Francisco Bank necessary to pay such withdrawals, secured by pledge of the Association’s notes and trust deeds and other assets, which caused no actual injury to the Association and which could in any event have been eliminated by successful resort to the administrative remedy afforded (Op. Br. 5, 6-8);

(3) alleged clouding of title by means of such loan and pledge, which cloud, however, was really created by the Title Service Company’s collateral attack on the order appointing the Conservator.

Plainly, claims based on such “temporary interference” with the Association’s business (*Ewing v. Mytinger & Casselberry*, *supra*, at 601) state no claim for relief within the jurisdiction of the court below because,

(1) the administrative determination of probable cause for appointing the Conservator in advance of hearing is not reviewable for any pur-

pose, but if reviewable is adequately supported by the admitted facts (Op. Br. 56, 59-67; see also *Ewing v. Mytinger & Casselberry, supra*);

(2) such determination, if erroneous or even malicious, affords no basis for the recovery of money damages or to nullify the Conservator's transactions during the period of his appointment (Op. Br. 42-54);

(3) the claims are barred for failure to invoke the administrative remedy, both because judicial review may be obtained only in accordance with the procedure duly prescribed by law and because the injuries complained of were susceptible of administrative correction (Op. Br. 54-59; see also *RFC v. Lightsey*, 185 F. (2d) 167).

Other damages are alleged, to be sure, including the making of some \$4,000,000 of improvident G. I. loans, but it is nowhere alleged—and could not be—that any such loans were made or damage caused before opportunity for administrative hearing was afforded. The Association complains that some \$73,000 to \$160,000 of the Association's funds were used by the Conservator to pay his own salary and administrative expenses (Ass'n Br. 275), but none of appellees have the temerity to assert in their verified pleadings that any of this sum was actually expended until long after opportunity for administrative hearing was afforded. The principles which preclude mulcting the Conservator in damages or nullifying his acts prior to the

termination of the conservatorship, moreover, preclude recovery on any of the grounds alleged in any event (Op. Br. 34-54).

The appellees also boldly assert that a further remaining object of the Mallonee action is the making of "a permanent injunction forever restraining the appellant-defendants from *ever* unlawfully or improperly interfering" with the elected management of the Association (Sh. Br. 20) (*italics supplied*). A sufficient answer is that the nonresident Board members are indispensable parties to the granting of such personal relief and have not been duly served (*Williams v. Fanning*, 332 U.S. 490; *Daggs v. Klein*, 9 Cir., 169 F. (2d) 174; Op. Br. 71-80; see *infra*, p. 40). The conclusive answer, however, is that by reason of well established limitations on judicial review (if any be available), any injunction which might be issued in the pending action would in no wise bar future administrative action supported by additional evidence (*Hormel v. Helvering*, 312 U.S. 552; *Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364), and that, by reason of settled limitations on injunctive relief generally, would not control administrative action based on any new facts or conditions (*Countee v. U. S.*, 9 Cir., 112 F. (2d) 447; *Blair v. Comm. of Internal Revenue*, 300 U.S. 5). A further objection, if any be needed, is that no such injunctive relief against future administrative action could ever be granted until the available administrative remedy had first been exhausted.

This disposes of the first six counts of the amended complaint and cross-claims and all other supplemental pleadings of plaintiffs and the Association in the Mallonee action. It likewise disposes of any claim based on the seventh count of both the first amended complaint (7 R. 3084) and the amended Association cross-claims (7 R. 3330) for an equitable accounting. The finding of the court below “that each of the various items of such accounting are affected by the alleged liability of various defendants and cross-defendants on issues of the litigation” (18 R. 8237 n.) is unfounded. No liability may be imposed for the disposition of the Association’s assets or the incurring of liabilities on the Association’s behalf in the exercise of the Conservator’s discretionary functions (Op. Br. 42-54). At most, therefore, the Conservator may be required to return the assets entrusted to him or the proceeds of any disposition thereof, subject to any liabilities incurred by him on the Association’s behalf, and to make a detailed statement of the assets originally entrusted to him and his disposition thereof (*Lucking v. Delano*, 122 F. (2d) 21, 29).

There is, however, no identity of issues between a proceeding to enforce such obligations and those involved in the proposed Board hearing, since the Conservator’s failure, if any, to perform such obligations could in no wise be attributed to the order originally appointing him, or to the alleged falsity of the grounds assigned for his appointment. Assuming, therefore, that a proceeding to enforce such obliga-

tions is maintainable in the court below, it affords no basis for the injunction on appeal.

An accounting proceeding even for such limited purpose, however, is not maintainable in the court below at all. As there is no allegation that the Conservator personally pocketed any of the Association's assets during the period of his appointment or on the termination thereof, it must be assumed that he returned all of the assets entrusted to him, or the proceeds thereof, in view of the presumption of official regularity (*Smith v. U. S.*, 32 F. Supp. 657; *Oakley County Club v. Long*, 325 Mass. 109, 89 N.E. (2d) 260; see also *United States v. Chemical Foundation*, 272 U.S. 1; *Procter & Gamble Co. v. Coe*, 96 F. (2d) 518). And the remaining obligation of the Conservator to make a detailed written report is enforceable only by administrative proceedings (Op. Br. 49, n. 9).

Appellees simply ignore most of these contentions and offer no tenable answer to the others. Thus, on the plainly unwarranted assumption that appellants "base their claim to immunity (from money damages) on the ground that the sovereign is immune to suit" (Ass'n Br. 205), appellees invoke decisions holding merely that consent to suit against government corporations is a waiver of the sovereign's *jurisdictional* immunity from the normal procedural incidents of suit, including garnishment and taxation of costs (*FHA v. Burr*, 309 U.S. 242; *RFC v. Menihan*, 312 U.S. 81), or that an action to recover property wrong-

fully withheld, without any claim for money damages, is not a suit against the United States (*Land v. Dollar*, 330 U.S. 731), or that the sovereign's consent to suit against a government corporation extends to actions sounding in tort as well as in contract, a decision rendered in an action based on negligent exercise of a ministerial non-discretionary function in the physical handling of property (*Keifer v. RFC*, 306 U.S. 381). Appellees do not trouble to cite or discuss *Spalding v. Vilas*, 161 U.S. 483, *Gregoire v. Biddle*, 177 F. (2d) 579, or any of the other authorities upholding a *substantive* immunity from money damages by reason of erroneous or even malicious exercise of a discretionary administrative function, or those applying such substantive immunity to "sue and be sued" government corporations (*Adams v. Home Owners' Loan Corp.*, 107 F. (2d) 139; *Atchley v. Tennessee Valley Authority*, 69 F. Supp. 952).

In truth, appellees seek to foreclose all argument on the twofold ground that the Board "confessed judgment" in terminating the conservatorship and that all prior orders of the court below are *res judicata*.

There is plainly no merit in the contention (Ass'n Br. 78-80) that the Board, by terminating the conservatorship in January, 1948, and directing the Conservator to file an accounting, thereby "confessed judgment as to many of the then pending issues of the litigation" and intended "to submit to the court all issues not abandoned by the confession of judg-

ment'' (Ass'n Br. 78-79). The Board order, although it afforded some of the same relief prayed for in the complaint (Ass'n Br. 80), was made in conformity with long established Board regulations contemplating the termination of a conservatorship and the filing of an accounting by the Conservator without regard to litigation (see Op. Br. 17, 48, 49, n. 9, App. B 161, 164). It contains no findings whatever, much less a finding that the original appointment was unwarranted; had such findings been made, however, they would have afforded no basis for imposing liability on appellants for acts done in conformity with the Board's prior decision appointing the Conservator (see Op. Br. 48). Certainly the contention that "Appellants' Home Loan Bank Board have themselves waived the immunity from suit of appellant Conservators Ammann and Bramley" (Ass'n Br. 206) will not bear analysis (Op. Br. 48).

The further contention that the prior orders of the court below are final and *res judicata* on issues of jurisdiction is unfounded, as elsewhere shown (Op. Br. 81-86), and in any event ignores the failure of the complaint and cross-claim to state any claim for relief on the merits. To deny such orders finality on this appeal, it should be added, will in no sense cloud the title to property of former and present borrowers from the Association. The plain fact is that titles to those properties are not and never were clouded as a result of the Conservator's appointment or his acts as such. The claim of cloud results from a refusal to recognize that the Conservator's appointment was

valid until duly set aside. Moreover, the judgments entered by the court below in the borrower-intervention proceedings were final as to the intervenors (although the rights of all other parties were “expressly reserved and preserved without prejudice” (Op. Br. 85)) and would, therefore, in no wise be disturbed by any judgment entered in this proceeding.

What has been said sufficiently answers the contention (Ass’n Br. 299-301) that the Board Order No. 2015 seeks to withdraw from the court below issues properly pending before it. There are no such issues, and certainly none which are identical with those involved in the proposed Board hearing. Whether, apart from the pendency of a judicial proceeding, the Board may now consider charges which were previously made the basis of a conservatorship since terminated, obviously goes to the merits of any agency action which may be taken after administrative hearing, and hence may not be considered in advance of such hearing (*Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41).

The implied suggestion that the Court should ignore the deficiencies in the appellees’ pleadings because of the unconscionable length of the appellate record is not only unfounded in principle, but is without basis in fact. Of the 11,500 pages of record (more than 80% of which was designated, unnecessarily, by appellees), the eight appellees’ pleadings, prolix as most of them are, occupy about a thousand pages, and the gist of their claims is all contained in their original pleadings of less than 300 pages, set forth in Volumes

I and II (1 R. 2-25, 43-55, 86-99, 260-268, 302-358; 2 R. 564-586).

Finally, the suggestion that appellants seek an order dismissing the action in order to avoid a trial on the merits is certainly without force. The avoidance of unnecessary and protracted litigation is a permissible objective on appeal from an interlocutory injunction. As former Chief Justice Taft observed in *North Carolina R. Co. v. Story*, 268 U.S. 288, 292:

“By the ordinary practice in equity, as administered in England and this country, an appellate court has the power, on appeal from a temporary or interlocutory order or decree, to examine the merits of the case if sufficiently shown by the pleadings and the record, and upon deciding them in favor of the defendant *to dismiss the bill and save both parties the needless expense of further prosecution of the suit.*” (Italics supplied.)

Such dismissal is particularly appropriate in the circumstances of this case. The continued maintenance of the Mallonee action constitutes an intolerable burden and interference with the normal exercise of the Board’s supervisory functions. The prior proceedings forcibly suggest that, if the action is permitted to continue, the resulting burden and interference may be voided only by acquiescing in a compromise (16 R. 7435, 7572), deemed by the Board contrary to the public interest (23 R. 10880-2), and embodied in a judgment *in rem* intended to bind the world (16 R. 7440, 7589), thus forever foreclosing any judicial inquiry into the merits of appellees’ claims and pre-

cluding even the Association's shareholders from ever calling its management to account on serious charges of breach of trust (16 R. 7589; 21 R. 9585, 9588-9).

The injunction should thus be reversed because the Mallonee action is not maintainable for any purpose. Were the action maintainable, however, there is no such threat of irreparable injury as to warrant the issuance of an injunction. Contrary to appellee's contention, Board Order No. 2015 in no wise threatens the liquidation of the Association. While it directs the Association to show cause why the Board should not enter its order "for such action as it deems necessary or appropriate", including the appointment of the Federal Savings and Loan Insurance Corporation as "receiver" for said Association (Op. Br. App. C 178), it neither authorizes nor directs any agency action in advance of administrative hearing or such judicial review as may be warranted by law. Indeed, the Board order nowhere indicates that even after hearing any action will be taken, much less the appointment of a receiver, but merely gives the Association due notice that the Board hearing will canvas every means of supervisory action, ranging from a minimal supervisory recommendation to the broadest of agency action, as the facts disclosed on hearing may warrant. Appellants are quite mistaken, moreover, in asserting that the Federal Savings and Loan Insurance Corporation, if appointed receiver, may proceed only to "liquidate" the Association. Section 406(b), National Housing Act (Op. Br. App. A 137), specifically authorizes the Corporation, as receiver, to

“operate such Association” or to “liquidate its assets”, *inter alia*, “whichever shall appear to be to the best interests of the insured members of the association”; and the Board regulations, though they authorize the appointment of the Corporation as receiver “for the purpose of liquidation” (Op. Br. App. B 149), extend to any receiver the same powers as those prescribed by Section 406(b) of the National Housing Act (*id.* 164), and specifically provide for “returning the association to its management” (*id.* 164).

A reply to all eight appellees’ contentions is set forth in further detail below, as they relate to the points made in our opening brief.

ARGUMENT.

I.

THE ALLEGATIONS OF THE MALLONEE ACTION, INSOFAR AS THEY RELATE TO THE VALIDITY OF THE CONSERVATOR’S APPOINTMENT, DO NOT STATE A CLAIM FOR RELIEF WITHIN THE JURISDICTION OF THE COURT BELOW.

A. THE ORDER APPOINTING THE CONSERVATOR IS VALID UNTIL DULY SET ASIDE, AND MAY NOT BE QUESTIONED IN COLLATERAL PROCEEDINGS ATTACKING THE INDIVIDUAL TRANSACTIONS OF THE CONSERVATOR PENDING THE DETERMINATION OF THE VALIDITY OF THE APPOINTMENT; ON TERMINATION OF THE CONSERVATORSHIP NO ACTION IS MAINTAINABLE TO INVALIDATE SUCH INDIVIDUAL TRANSACTIONS OR TO RECOVER DAMAGES ALLEGEDLY CAUSED BY THE APPOINTMENT OR OPERATIONS THEREUNDER.

This point, and the supporting decisions, including *Adams v. Nagle*, 303 U.S. 532; *Spalding v. Vilas*, 161

U.S. 483, and *Gregoire v. Biddle*, 177 F. (2d) 579, are nowhere discussed in any of appellees' briefs.

The sound policy of the rule of immunity from money damage claims arising out of the "abuse" of "discretionary functions" is confirmed by the express exclusion of such claims from the coverage of the Federal Tort Claims Act (28 U.S.C. 2680), with the avowed intention "not to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts. * * * Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort." (H. Rept. No. 2245, 77th Cong., 2d Sess., p. 10.)

B. ALL CLAIMS FOR RELIEF BASED ON THE ALLEGED INVALIDITY OF THE CONSERVATOR'S APPOINTMENT ARE BARRED FOR THE FURTHER REASON THAT THE PLAINTIFF SHAREHOLDERS AND THE ASSOCIATION FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDY.

Appellees purport to answer this point on grounds which will not bear analysis. It is asserted that the administrative hearing tendered on June 5, 1946 would have been futile because the Board officers had already stated that "under no circumstances would they ever return the business to its founding officers and directors" (Ass'n Br. 19), a contention which the Supreme Court rejected in *Fahey v. Mallonee*, 332 U.S. 245, at 256. It is further asserted that such administrative hearing would have been inadequate because the Board was without power to remove clouds on titles or dispose of the \$14,000,000 of assets in

the registry of the court (Sh. Br. 103), which simply ignores that the alleged cloud was created by collateral attacks on the Conservator's appointment and that the assets were deposited in court (after opportunity for administrative hearing was afforded) in connection with such collateral attacks (see Op. Br. 86). The contention that the Board would have had no jurisdiction over Title Service Company, the Association's shareholders and borrowers, proceeds on the same elementary misconception (Sh. Br. 104). The Board, as appellees assert (Sh. Br. 102), could not have considered the validity of the orders dissolving the Los Angeles Bank, but the termination of the conservatorship could have been effected without regard to the Los Angeles Bank matters, and indeed, such was done in January, 1948.

The suggestion that the Association's shareholders may sue because they were not afforded administrative hearing (Sh. Br. 100) is without point. It is certainly novel doctrine that an administrative remedy may be ignored because extended to the corporation but not in terms to its numerous shareholders. The Board Order of June 5, 1946 granting the Association's request for an administrative hearing, it may be added, granted leave to "any person * * * claiming to have an interest in the subject matter involved" to "file a petition for leave to intervene" (Op. Br. 55, n. 10).

Finally, the contention that the Board abandoned the administrative hearing and by Order No. 388 "themselves submitted to the court for decision all

remaining issues'' (Ass'n Br. 236), is plainly specious (see *supra*, p. 14).

As the administrative hearing originally tendered in June, 1946, related only to the questions whether the original appointment was warranted and whether the conservatorship should be continued (1 R. 144), the right to such hearing ceased on the termination of the conservatorship. Failure to exhaust the administrative remedy before the time to pursue the same thus expired waived all right to complain in the courts thereafter (*Yakus v. U. S.*, 321 U.S. 414; *Lichter v. U. S.*, 334 U.S. 742, 793-794; *Reconstruction Finance Corp. v. Lightsey*, 185 F. (2d) 167).

C. THE CLAIMS BASED ON THE ALLEGED INVALIDITY OF THE ORDER APPOINTING THE CONSERVATOR ARE NOT MAINTAINABLE FOR THE FURTHER REASON THAT THE ORDER, IF SUBJECT TO JUDICIAL REVIEW, IS VALID AS A MATTER OF LAW ON THE ADMITTED FACTS, AND BECAUSE SUCH ORDER, MOREOVER, IS NOT OPEN TO REVIEW ON THE GROUNDS ALLEGED IN THE COMPLAINT AND CROSS-CLAIMS.

1. The order of May 20, 1946, appointing the conservator is valid as a matter of law on the admitted facts.

This point, set forth on pages 59 to 67 of our opening brief, is ignored by appellees. The fact is that the utterly unwarranted attempt by the Association's directors to vest control in themselves by creation of 16,000 one-dollar share accounts and the voting of funds to defend against their removal for mismanagement plainly establish probable cause for appointment of a temporary conservator, pending full hearing.

2. The order appointing the conservator is not open to judicial review on the grounds alleged in the complaint and cross-claims.

The arguments and authorities discussed on this point at pages 67 to 71 of our opening brief are ignored by appellees. Appellees content themselves with the mere assertion that the Administrative Procedure Act has removed all limitations heretofore existing in the scope of review of discretionary functions (Sh. Br. 61-69).

Section 10 of the Act relating to judicial review, made effective on September 11, 1946 by Section 12, is probably inapplicable to any action pending prior to that date. The Supreme Court has decided all such cases without reference to Section 10 (*United States v. Ruzicka*, 329 U.S. 287 (1946); *Board of Governors of the Federal Reserve System v. Agnew*, 329 U.S. 441 (1947); *Krug v. Santa Fe Pacific Rd. Co.*, 329 U.S. 591 (1947); *Patterson v. Lamb*, 329 U.S. 539 (1947); Attorney General's Manual, Administrative Procedure Act, pp. 93-94). Even if applicable, however, all subsections of Section 10 are subject to its introductory clause, "except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion", a qualification which, as its legislative history shows, was intended to include *implied* limitations as well as those expressly provided by statute.² Thus, a civil service em-

²As originally introduced in both Senate and House, Section 10 provided for judicial review of agency action "except so far as statutes *expressly* preclude judicial review" (italics added) (S. 7, H. R. 1203, 79th Cong., 1st Sess.). The Senate Committee on the

ployee of the Federal Government who alleges unlawful removal from office, can obtain judicial review only of the question whether the procedures of the Civil Service Act were followed (*Levine v. Farley*, 107 F. (2d) 186, App. D. C., 1939, certiorari denied, 308 U.S. 622). In such a case, the provisions of Section 10(e), for example, relating to substantial evidence and to review of abuses of discretion, clearly do not apply.

Were the Administrative Procedure Act applicable, however, and to the full extent claimed by appellees, it would in no wise affect the appellants' immunity from money damage claims arising out of the exercise of a discretionary function (Op. Br. 42-54); or modify the rule requiring exhaustion of the administrative remedy (Op. Br. 54-59); or furnish any answer to appellants' contention that the interim

Judiciary, to which S. 7 was referred, issued a preliminary print of the bill in which the word "expressly" was deleted without specific explanation, but with the observation that the introductory clause of Section 10 was intended to "state the two present general or basic situations in which judicial review is precluded * * * where * * * statutes withhold judicial powers." (Sen. Doc. 248, p. 36.) The significance of the deletion, and the manner in which it is controlling of the present inquiry, is apparent from the Attorney General's comments on the bill subsequently submitted to the Chairmen of both Judiciary Committees. The Attorney General said (Sen. Doc. 248, pp. 229-230, 413):

"Section 10. This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation are: *Switchmen's Union of North America v. National Mediation Board* (320 U.S. 297); * * *"

order appointing the conservator pending hearing was valid on the admitted facts (see *supra*, p. 22; Op. Br. 59-67).

D. THE MALLONEE ACTION IS IN NO EVENT MAINTAINABLE AGAINST THE INDIVIDUAL NONRESIDENT DEFENDANTS, FOR THE REASON THAT THE DISTRICT COURT LACKED JURISDICTION OVER THE PERSON OF SUCH DEFENDANTS.

1. The court lacks personal jurisdiction over the nonresident defendants in respect to the demands in the shareholders' complaint and Association's cross-claims.

a. Prior to the termination of the conservatorship, the Mallonee action was not maintainable against the nonresident defendants even for the limited purpose of removing the conservator.

This point, as set forth in our opening brief at pages 71 to 73, is discussed at length in the briefs of appellees (see e.g., Ass'n Br. 95-121). The argument, if we understand it, is that the action concerns titles to assets in southern California over which the federal courts in the District of Columbia would have no jurisdiction (see Ass'n Br. 104-5), an argument which simply ignores that, at most, the Conservator (not the nonresident Board members) took "possession" of the Association, which could have been restored by an order *in personam* issued by any court with jurisdiction over the person of the Board members or the Conservator. As the point is now of little importance, following the return of the Association to its private management, there is no occasion for any extended reply.

b. *The action is clearly not maintainable against the nonresident defendants for damages or other in personam relief.*

This point, set forth at pages 73 and 74 of our opening brief, is simply ignored by appellees.

2. **The so-called cross-claims in interpleader afford no basis for service on the nonresident defendants, even in respect of such cross-claims alone.**

This point, set forth on pages 74 to 79 of our opening brief, is discussed at length in the briefs of appellees (see, e.g., Ass'n Br. 122-159; Sh. Br. 44-50; Wal. Br. 13-22). Nowhere, however, in any of their lengthy briefs do the Long Beach Association and its affiliated interests discuss or even mention appellants' contention that all such interpleaders constitute an impermissible collateral attack. At most, it is argued that jurisdiction to entertain a bill of interpleader is not dependent upon the merits of the claims of the alleged adverse claimants (see e.g., Ass'n Br. 154; Wil. Br. 19-20). The cases cited (*Hunter v. Federal Life*, 111 F. (2d) 551, and *Metropolitan Life v. Segaritis*, 20 F. Sup. 739), involving private adverse claimants, do not even remotely suggest that a stakeholder or interested party may by collateral attack call in question the authority of a conservator appointed under the Home Owners Loan Act. Any policy to protect private persons against risk of loss from conflicting claims must yield to the public interest in preventing an "intolerable" interference with the operation of the association pending litigation concerning the validity of the order appointing

the Conservator (Op. Br. 39-41). The rule enforcing such order until duly set aside and forbidding collateral attack thereon adequately protects cross-claimants against such risk, a risk particularly negligible in this case in view of the identity of interests of the private management of the association and the cross-claimants in interpleader. (Op. Br. 75-76).

Could such interpleader be maintained, however, the Court would be in duty bound to direct the stakeholder to acknowledge the authority of the conservator without inquiring into the validity of his appointment or the issues sought to be raised in the shareholders' complaint or Association cross-claims. Such order was suggested by appellants to the court below after the decision in *Fahey v. Mallonee* and rejected (6 R. 2491-2).

What has been said applies with equal force to the Association's motion to impound the \$6,300,000 of notes evidencing a loan by the San Francisco Bank to the Association and collateral securing the same, a motion treated by appellees as one of the "interpleaders" on which the jurisdiction of the court below is allegedly based (Ass'n Br. 134). Concededly, the San Francisco Bank has some 300 members, and most of the former members of the Los Angeles Bank have done business with the San Francisco Bank because of favorable terms not available from other sources (20 R. 9346-9). These associations have not only been notified of the litigation, but have either been made parties or served with some of the papers

in the action. If they cannot safely make payments to the San Francisco Bank on loans procured from that bank without running the risk that the Los Angeles Bank may disregard such payments should it prevail in the future litigation, it would be impossible to conduct the business of the Bank or, indeed, its association members. To call in question the authority of the San Francisco Bank pending the outcome of the litigation as to its status is, therefore, an “intolerable” interference with the policy of the Federal Home Loan Bank Act (*Adams v. Nagle*, 303 U.S. 532, 540).

What has been said concerning the so-called “interpleaders”, it should be emphasized, is sufficient to establish not only that none meet the requirements of 28 U.S.C. 1335 for extraterritorial service, but also that they each fail to state any claim for relief, and are hence likewise not maintainable under Rule 22 of the Federal Rules of Civil Procedure.

3. The nonresident defendants at no time submitted themselves to the jurisdiction of the court below.

This point, set forth in our opening brief at pages 79 to 81, is discussed at length by appellees (see e.g., Ass’n Br. 80-95), but the argument ignores that the Federal Rules of Civil Procedure abolish the distinction between a “special” and “general” appearance (Rule 12(b)) and permit a defendant to join an objection to jurisdiction with any defense on the merits. The cases on which appellees rely were decided before the adoption of the Federal Rules of Civil Procedure and are not controlling (*Blank v.*

Bitker, 135 F. (2d) 962; *Phillips v. Baker*, 9 Cir., 121 F. (2d) 752; *Orange Theatre Corp. v. Ray Herstz Am. Corp.*, 3 Cir., 139 F. (2d) 871; 2 *Moore's* Fed. Proc. (2d Ed.) 2262, et seq.; *Simkins* Federal Practice, (3rd Ed.) Sec. 34, p. 47, et seq.). A defendant may now join a claim for affirmative relief without waiving objection to jurisdiction over his person; Rule 12(b) includes a "counter-claim" as a "defense", thus plainly indicating that prayer for affirmative relief is covered by the provision that "no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion" (*Saddler v. Pennsylvania Ref. Co.*, 33 F. Supp. 414; *Blank v. Bitker*, *supra*).

The appellants, however, neither sought nor obtained any affirmative relief. The election of Association directors *after* the return of the Association to its former management, directed by the District Court on its own initiative, was in no sense the same as an election *before* such return, as the Board had directed; the bond "volunteered" (18 R. 8318) by the Association was an ordinary incident of such order, which order the appellants duly resisted; and the mere inquiry by appellants' counsel whether it would be "proper to suggest" that the order include a provision validating the acts of the conservator (22 R. 10332), hardly amounts to a claim for affirmative relief where the appellants were resisting the removal of the Conservator altogether. Appellants did consent to the appointment of Mr. Walker as Special Master, but only after their objections to the removal of the

Conservator were overruled; the appointment of such Special Master was most certainly not relief prayed for or requested by appellants.³

E. NONE OF THE ORDERS HERETOFORE ENTERED BY THE COURT BELOW PRIOR TO THE INJUNCTION ON APPEAL AFFORD ANY BASIS FOR FURTHER MAINTENANCE OF THE MALLONEE ACTION.

1. None of such orders are res judicata.

This point, discussed at pages 81 to 86 of our opening brief, is argued at length by appellees (see e.g., Ass'n Br. 106-7, 111, 160-80; Sh. Br. 72-93; T.S. Br. 8-12). Notwithstanding their lengthy and labored arguments, however, appellees nowhere furnish any answer to the arguments set forth in our opening brief on this point (Op. Br. 81-86; see also *Hill v. United States*, 298 U.S. 460, 466; *Carbone v. Superior Court*, 18 Cal. (2d) 839, 117 Pac. (2d) 872; *Bannon v. Bannon*, 270 N.Y. 484, 1 N.E. (2d) 975, 105 A.L.R.

³The further contention that the Board is subject to service in California by reason of "doing business" in that state through its "local agents", including the Federal Home Loan Bank of San Francisco, the Federal Savings and Loan Insurance Corporation, and various Federal Savings and Loan Associations (Ass'n Br. 181-203), is plainly specious. The sufficient answer, all else aside, is that doing business is the basis for service only in the case of a "corporation" (28 U.S.C. 1391(c)) or partnership (FRCP Rule 4(d)); the Bank Board and its members answer to neither description. Rule 4(f) otherwise limits service to the territory of the state in which the district court is held except "when a statute of the United States" otherwise provides, and the only such statutes invoked are Section 1655 (formerly 118) of Title 28 U.S.C. and Section 1335 thereof, neither of which is applicable (see *supra*, p. 28). It may be noted, in passing, that counsel for the Association himself filed an affidavit that the Federal Savings and Loan Corporation "has no officers, agents or representatives, within this State of California, authorized to accept service", as a basis for an order for service on "absent defendants" (11 R. 5301-2).

1401). While the District Court's prior orders may possibly be treated as the "law of the case" in the same court, they have, of course, no such effect on appeal (*Diaz v. Patterson*, 263 U.S. 399; *Messinger v. Anderson*, 225 U.S. 436; *King v. W. Va.*, 216 U.S. 92; *Pan American Railroad Co. v. Napier Shipping Co.*, 166 U.S. 280).

None of the cases cited by appellees furnish any support for their contentions. Most of them involve a collateral attack upon a final judgment entered in a wholly separate and independent action (*Stoll v. Gottlieb*, 305 U.S. 165; *Chicot, etc. v. Baxter State Bank*, 308 U.S. 371; *Treinies v. Sunshine Mining Co.*, 308 U.S. 66; *Dugas v. American Surety Co.*, 300 U.S. 414; *American Surety Co. v. Baldwin*, 287 U.S. 156; *Baldwin v. Iowa Traveling, etc.*, 283 U.S. 522). Two others involve the finality for purposes of appeal of a judgment entered prior to the termination of the final action (*Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507; *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541), in which no question of *res judicata* was involved and which in no event could have any bearing on the effect as *res judicata* of an interim order based solely on affidavits and other evidence "not so extensive as at the trial of the action" (*Carbone v. Superior Court*, 18 Cal. (2d) 768, 772, 117 Pac. (2d) 872, 874). Finally, *Walling v. Miller*, 138 F. (2d) 629, involved only the question whether a consent judgment was subject to appeal on the ground that the plaintiff was without standing to sue, the court holding that no such appeal would lie as the objection was not jurisdictional.

There is likewise no merit in the contention that the Supreme Court, in refusing to direct dismissal in *Fahey v. Mallonee*, *supra*, required that the case be tried (Ass'n Br. 162-3). The Supreme Court commonly declines to decide novel issues not passed upon by the courts below, as confirmed by *N.L.R.B. v. Pittsburgh S.S.*, 337 U.S. 656, quoted in Wil. Br. 49-50; *Rosenthal v. N.Y. Life Ins. Co.*, 304 U.S. 263; *Cities Service Oil Co. v. Dunlop*, 308 U.S. 208; *U. S. v. Knight*, 336 U.S. 505; *U. S. v. Interstate Commerce Comm.*, 337 U.S. 426. In reversing "without prejudice to any other administrative or judicial proceedings which may be warranted by law" (*Fahey v. Mallonee*, 332 U.S. at 257-8), the Supreme Court merely left open the question whether judicial review might be had, which question it had declined to decide in the absence of any rulings thereon by the court below. The court below properly construed the Supreme Court's opinion as requiring him, "as a judge of this court, to pass upon the matters which were raised on the motions to dismiss and which were not decided by the Supreme Court" (22 R. 10283).

From the foregoing it clearly appears that none of the prior orders are *res judicata* of any issue on this appeal. What the appellees really contend, however, is that by reason of the termination of the conservatorship by Board and Court order in January, 1948, the Board was thereafter without power to take any future supervisory action which might disturb the control of the Long Beach Association's private management. A sufficient answer is that the Board order now on appeal contemplates only a hearing and pro-

vides for no other administrative action of any kind. A further answer is that neither Board Order No. 388 of January 17, 1948 nor the Court Order of January 23, 1948, enforcing the return, contains any findings as to the charges made in the original order of appointment, or in any way touches the Board's power to exercise supervisory control, including the appointment of a conservator or receiver, for the future. The Long Beach Association is in no different position for this purpose than other associations for which no conservator has ever been appointed in the past.

2. The deposit in court of some \$14,000,000 of assets pursuant to certain of such orders likewise affords no basis for the further maintenance of the Mallonee action or any cross-claims therein.

The appellants' contention that the assets now on deposit in the registry of the court are improperly retained and should be released, set forth at pages 86 to 88 of our opening brief, is nowhere answered by appellees, save possibly in the untenable argument that the orders directing such deposits are now final and *res judicata*.

II.

THE COMPLAINTS IN THE CONSOLIDATED ACTIONS, INSOFAR AS THEY RELATE TO THE ORDERS OF MARCH 29, 1946, STATE NO CLAIM FOR RELIEF WITHIN THE JURISDICTION OF THE FEDERAL COURTS.

These appellants quite agree with the contention of the appellees, the former Los Angeles Bank, that there is no identity of issues between the proposed

Board hearing and the Los Angeles action as pleaded by this appellee (L.A. Br. 10-12). Indeed, we so asserted in our opening brief (Op. Br. 109).

The plaintiff shareholders and the Association, however, have drawn their allegations in the *Mallonee* action so as to render inseparable those relating to the orders of March 29, 1946, dissolving the Los Angeles Bank, and those relating to the order of May 20, 1946 appointing the conservator. The Association specifically alleges that the allegations concerning all the orders of both dates are "inseparable" (7 R. 3311), and the court below so found in granting the injunction on appeal (24 R. 11151).

A. THE FINDING OF THE HOME LOAN BANK ADMINISTRATION THAT THE ORDERS IN CONTROVERSY WOULD "AID THE EFFICIENT AND ECONOMICAL ACCOMPLISHMENT OF THE PURPOSES OF THIS ACT", THOUGH MADE WITHOUT HEARING, IS NOT OPEN TO JUDICIAL REVIEW.

The appellants' contention that there can be no judicial review of the Board's finding that the orders in controversy would "aid the efficient and economical accomplishment of the purposes of this Act" (Op. Br. 90-96) is nowhere answered in any of appellees' briefs, apart from the unfounded contention that the Administrative Procedure Act confers jurisdiction to review the exercise of any administrative discretion.

The principal contention advanced both by the Long Beach Association and its affiliates and the Los Angeles Bank is that the denial of a hearing violated due process. The argument ignores that the Bank is not a private person incorporated on the application of private individuals, but a *public* agency

created by the Board pursuant to the express direction of Section 3 of the Federal Home Loan Bank Act, with its original directors mere nominees of the Board (Sec. 7(c), Act of July 22, 1932, 47 Stat. 730); and that the unqualified right to dissolve was reserved by the Act to the Board and the Congress under Section 25. The Bank was thus subject to dissolution without hearing as freely as municipal corporations may be dissolved by a state (*State v. City of Beloit*, 42 N.W. 110, 111, 74 Wis. 267; *State v. Hightower*, 36 S.E. (2d) 649, 650, 226 N.C. 62; *Southland Gasoline Co. v. Bayley*, 319 U.S. 44; *Comrs. of Laramie County v. Comrs. of Albany County*, 92 U.S. 307; *Mt. Pleasant v. Beckwith*, 100 U.S. 514; *Hunter v. Pittsburgh*, 207 U.S. 161; *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394; *Trenton v. New Jersey*, 262 U.S. 182, 129 A.L.R. 1471; *McDonough v. Goodall*, 13 Cal. (2d) 741, 91 Pac. (2d) 1035; *School District v. Callahan*, 237 Wis. 560, 135 A.L.R. 1081).

None of the appellees, moreover, attempt to answer the appellants' contention that the Bank is estopped to question the validity of the act authorizing dissolution without hearing (Op. Br. 90-1), or to distinguish the controlling analogy of the valid statute authorizing the Comptroller of the Currency to appoint receivers for national banks and to assess their shareholders without any hearing (see Op. Br. 90-1, n. 16). The appellees' contention that the word "find" used in Section 26 implies a statutory duty to grant a hearing as a condition of dissolution is without substance (*Southland Gasoline Co. v. Bayley*, 319

U.S. 44; *Eastern Airlines v. Civil Aeronautics Board*, 185 F. (2d) 426; *State v. City of Beloit*, 74 Wis. 267, 42 N.W. 110; *State v. Hightower*, 226 N.C. 62, 36 S.E. (2d) 649). The cases cited by appellees to the contrary (L. A. Br. 18) are not in point. In two of them (*Abrahams v. Dougherty*, 60 Cal. App. 397, 401; *Mt. Carmel Public Utility & Service Co. v. Public Utilities Comm.*, 130 N.E. 693), a hearing was deemed required as a matter of due process independently of the directive to make a "finding". In the third (*California Lighting Comm. v. Mahn*, 59 Cal. App. (2d) 322, 324-5), the court held a mere "investigation" of the facts sufficient.

B. NEITHER THE FORMER LOS ANGELES BANK NOR THE COMPLAINANT ASSOCIATIONS HAVE ANY STANDING TO SUE.

This point (Op. Br. 96-100) is ignored in the briefs of the Long Beach Association and its affiliates. The arguments advanced by the Los Angeles Bank (L. A. Br. 22-23) are sufficiently answered in our opening brief.

C. THE COURT BELOW LACKED JURISDICTION OVER INDISPENSABLE PARTIES.

1. **The Home Loan Bank Board and its members are indispensable parties to the maintenance of the Bank action.**

The attempted answer to the appellants' contention (Op. Br. 100-102) is, in essence, that no parties are indispensable to an action *in rem* (see e.g., Ass'n Br. 250-254; L. A. Br. 24). Nowhere is there any answer to appellants' contention that the action, in the view most favorable to appellees, is one to enforce a con-

tract, the bank charter, a proceeding to which all parties to the contract are indispensable parties (Op. Br. 100-3), and for “reactivation” of the Los Angeles Bank (Sh. Br. 17), which requires the personal “approval” of the Bank Board.

2. Valid service on the Board or its members was not had.

Nowhere in appellees’ briefs is there any answer to the appellants’ contention (Op. Br. 101-3) that the relief prayed for requires a judgment *in personam* and hence is not obtainable under former Section 118 (now 1655), Title 28, U.S.C.

D. THE SUIT IS ONE AGAINST THE UNITED STATES TO WHICH THE UNITED STATES HAS NOT CONSENTED.

The appellants’ contention that the “reactivation” of the Los Angeles Bank requires *affirmative* official action to obtain the relief prayed for and hence is an unconsented suit against the United States (Op. Br. 104-6) is nowhere answered. While the Administrative Procedure Act is invoked, the contention that this Act is not intended to abrogate the historic immunity of the sovereign from suit is wholly ignored.

E. THE ORDERS OF MARCH 29, 1946 DISSOLVING THE LOS ANGELES BANK, IF OPEN TO REVIEW ON THIS PROCEEDING. ARE VALID ON THEIR FACE.

Appellants’ contention that the complaints fail to negative the presumptive existence of facts to support the orders dissolving the Los Angeles Bank in the interest of the more “efficient and economical accomplishment of the purposes of the act” is nowhere answered.

The sole argument is that of the Los Angeles Bank that the Board failed to follow the procedure for dissolution prescribed by Section 26 (L.A. Br. 29-34). A sufficient answer is that, "where a statute contains a grant of power enumerating certain things which may be done, and also a general grant of power which, standing alone, would include these things and more, the general grant may be given full effect if the context shows that the enumeration was not intended to be exclusive" (*Springer v. Philippine Islands*, 277 U.S. 189, 206; *Gibbons v. Ogden*, 9 Wheat. 1).

In any event, the former Federal Home Loan Bank of Los Angeles was "liquidated" and its stock "paid off and retired" within the meaning of Section 26 of the Federal Home Loan Bank Act. The administrative orders admittedly "dissolved" the Bank. The provision in the accompanying orders for payment of the Bank's shareholder members in stock of the San Francisco Bank constitutes payment within the meaning of Section 26. To have made payment in cash would have required the dissolution of the Federal associations formerly members of the Los Angeles Bank, since until 1950 such associations were required to be members of some Federal Home Loan Bank (see 5(f) Home Loan Owners Act; Op. Br. App. A 130), and stock ownership is a condition of Bank membership (Federal Home Loan Bank Act, Sec. 6; Op. Br., App. A, 115-116). Section 26, moreover, expressly contemplated a liquidation without any cash distribution, in making specific provision that "any

other Federal Home Loan Bank may, with the approval of the Board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part". The argument that this provision requires the initial consent of such "other" bank is untenable. Congress could not have intended to condition the effective dissolution of an unneeded bank on securing consent of another bank. In any event, the first amended complaint of the Association's shareholders specifically alleges that the Portland Bank redesignated as the "Bank of San Francisco" subsequently ratified the Board orders of consolidation (7 R. 3025).

Finally, in the case of such public corporations, the term "reorganization" as used in Section 26, includes a liquidation of one bank and the transfer of its assets and liabilities to any existing bank (cf. *Wheeler S. District v. Hawley*, 18 Wash. (2d) 37, 137 Pac. 1010.) In the context of Section 26, the term "reorganization" must be deemed to include any procedure which involves the continuation of the business of the dissolved bank in a different corporate form.

III.

**QUITE APART FROM THE FOREGOING, THE INJUNCTION
SHOULD NOT HAVE BEEN ISSUED.**

- A. THE COURT BELOW LACKED JURISDICTION OVER THE PERSONS OF THE DEFENDANT HOME LOAN BANK BOARD MEMBERS, WITHOUT WHICH THE COURT LACKED POWER TO ISSUE THE INJUNCTION.**

Appellees nowhere deny that jurisdiction *in personam* is required for the issuance of an injunction to restrain the nonresident Board members from conducting an administrative hearing. Jurisdiction to issue such relief *in personam* cannot be acquired, of course, under former Section 18 (now 1655) of Title 28 U.S.C., nor under the interpleader statutes for the purpose involved (*Hagen v. Central Avenue Dairy*, 180 F. (2d) 502). Appellees are thus reduced to their unfounded contention that the Board members submitted to the court's jurisdiction over their persons by adopting Order No. 388 of January 17, 1948.

- B. THE ISSUES FOR CONSIDERATION AT THE PROPOSED BOARD HEARING AND ITS OBJECTS WERE NOT THE SAME AS THOSE INVOLVED IN THE PENDING MALLONEE AND LOS ANGELES ACTIONS.**

This point is nowhere answered save for the mere unsupported assertion that "everyone of the four grounds of Order 2015 directly affects matters pending in issue before the District Court" (Ass'n Br. 43).

C. THE COURT'S FINDING THAT ITS PROCESS IS AVAILABLE TO THE BOARD TO PROTECT THE PUBLIC INTEREST CONFIRMS THAT THE INJUNCTION WAS IMPROVIDENTLY ISSUED.

This point is ignored in appellees' briefs.

The statement that the supervisory examination "as of" July 16, 1949 "disclosed not one criticism of the Association or the conduct of its business" (Ass'n Br. 278) does not warrant comment, since the question of the method in which the Association's business was conducted was initially one for the Board's determination and not for the court below. It may be noted, however, that the cross-examination of Turner showed that this July examination did not include inspection of any records outside of the Association itself (24 R. 10991-3, 11047); the rejected appellants' exhibits A, B and C were offered to prove that such outside examination was required to test the validity of the records of the Association with regard to loans to dummies or the compensation, if any, paid to officers as the price of a loan from the Association (24 R. 10991-3, 11047, 11060).

D. THE ORDERING OF AN ADMINISTRATIVE INVESTIGATION AND HEARING ALONE DOES NOT CONSTITUTE IRREPARABLE INJURY.

The arguments on this point in appellees' briefs warrant no further answer.

CONCLUSION.

It is therefore respectfully submitted that the order of injunction should be reversed and the action dismissed.

Respectfully submitted,

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No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LARROQUE, J. ALSTON ADAMS; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION; FEDERAL HOME LOAN BANK OF SAN FRANCISCO; JOHN H. FAHEY, A. V. AMMANN, and GEORGE K. BRAMLEY,

Appellants,

vs.

MALLONEE, BUCKLIN, and FERGUS, *i. e.*, the SHAREHOLDERS' PROTECTIVE COMMITTEE of LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, *et al.*,

Appellees.

PETITION FOR REHEARING BY APPELLEE, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION.

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IN THE

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Appellees.

PETITION FOR REHEARING BY APPELLEE, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION.

Introduction.

The Appellee, Long Beach Federal Savings and Loan Association, respectfully petitions this Honorable Court for a rehearing, either in bank or before this same panel, of the appeal in the above-entitled cause, and in support of this petition represents to the Court as follows:

We reserve our argued position set forth specifically in our previous briefs, but in this Petition address ourselves solely to those features of the decision wherein we believe

the Court may be convinced its result is based upon the application of incorrect legal principles.

THEREFORE, this Petition is devoted to convincing this Court that it has erred in its determination as follows:

Rehearing and reconsideration by this Honorable Court of Appeals (either in bank or before the same panel) is respectfully urged by the Petitioner because, while the 100-page opinion (with footnotes) orders only that the order of preliminary injunction restraining the holding of an administrative hearing be reversed, the opinion discusses many fundamental jurisdictional questions, which are not necessary to the decision.

These holdings, if not modified by rehearing, go far beyond the scope of issues reviewable on this appeal. Such holdings are contrary to final judgments of the court below (from which no appeal was ever taken) and which are not now subject to review or reversal four or more years after entry of such judgments. The opinion appears to:

A. DISMISS PLEADINGS PASSED UPON BY SUPREME COURT:

Review, and order dismissed, pleadings unsuccessfully attacked in the U. S. Supreme Court in 1946, 1947 and in this Court of Appeals in 1947, 1948 and 1950.

B. NULLIFY THE INTERPLEADER STATUTE:

Vacate Interpleader relief granted four or more years ago by final judgments of the Court.

C. VACATE FINAL JUDGMENTS FOUR AND FIVE YEARS OLD:

Final judgments are swept aside by attacks upon original pleadings long since superseded by amendments, which amendments are now more than five years old and were unsuccessfully attacked in later appeals.

D. DENY AMENDMENTS IN FURTHERANCE OF JUSTICE:

The power of a trial court to permit amendments in furtherance of justice is held lost because of "sixteen months' delay". (This delay was caused solely by previous appeals to the U. S. Supreme Court in 1946 and 1947; the Supreme Court refused to dismiss the pleadings thus attacked.)

E. EXPAND "EXHAUSTION OF ADMINISTRATIVE REMEDIES":

The doctrine of Exhaustion of Administrative Remedies is expanded to preclude access to the Courts by parties to whom administrative hearings were never available, or were expressly denied by the Administrative Board. The doctrine of Exhaustion of Administrative Remedies is so expanded as to prevent any recourse to the Courts by thousands of homeowners wholly unconcerned with the administrative process and whose right to clear the titles to their homes is denied solely because of acts of others over whom the homeowners have no control.

F. PREVENT STAY POWER:

The opinion denies the traditional, as well as the statutory, power of a reviewing court, by either stay or injunction, to prevent merger pending administrative hearing or to, in any way, make orders to preserve the *status quo* prior to final termination of the administrative process to be reviewed.

G. DENY INTERPLEADER POWER TO PREVENT MULTIPLICITY OF ACTIONS:

In reversing the injunction against the administrative hearing, the opinion appears also to reverse the traditional interpleader injunction against litigation in any other courts. Parties would thus be required to withdraw their claims against the assets interplead for more than four years in the court below and to re-litigate in thousands of separate actions, and this without comment on the power of the court in interpleader.

H. LEAVE ACCOUNTING UNDECIDED:

The doctrine of Exhaustion of Administrative Remedies, if so expanded, would prevent enforcement of any order for accounting made by the administrative agency itself, prayed for in all pleadings (both original and amended), by the Shareholders' Protective Committee and by the Association, and which was ordered by a judgment of the District Court, now final for more than four years.

Exhaustion of Administrative Remedies is said to be a prerequisite to obtaining accounting for \$26,000,000.00 in cash, Government Bonds, and negotiable securities, seized without notice and for which receipts were summarily refused.

All these disastrous consequences are caused without discussion or consideration of:

- (1) Finality of the judgments clearing the titles to the homes of 8,000 borrowers.
- (2) The right of the Shareholders' Protective Committee to judicial decision of their objections to the removed Conservator's accounting, as ordered by final judgment of the court below, and by final administrative order No. 388, neither of which has been reversed or modified. (The time for appeal from that final judgment expired more than four years ago.)
- (3) The right of 16,000 Shareholders to obtain Declaratory Relief against the Federal Savings and Loan Insurance Corporation, to determine whether or not their \$22,000,000.00 in savings are insured and if so, the amounts, terms and condition of such insurance.

More detailed consideration of the opinion and the particulars in which Counsel believe it in error, follow.

I.

DISMISSAL WILL RE-TANGLE TITLES.

Dismissal of the Mallonee-Association actions, if ordered by the Court of Appeals, will hopelessly re-tangle the titles cleared by the final judgments of the court below. Such dismissal cannot be final or conclusive against the rights of all parties to bring further actions.

Under California law, dismissal by a federal court upon the grounds stated in the Court of Appeals' opinion, is not conclusive of the merits and is not *res judicata* as between the parties. California cases so holding are:

Pickering Lumber v. Whiteside, 54 Cal. App. 2d 200, 128 P. 2d 899, District Court of Appeal, Calif., 1942. Hearing denied California Supreme Court. Cert. Den. U. S. Supreme Court, 1943, 318 U. S. 763, 87 L. Ed. 1135.

The U. S. District Court in Missouri, in bankruptcy re-organization proceedings, dismissed intervention petitions of parties claiming ownership to land in California. After such dismissal, the U. S. Court ordered delivery of a deed to California land by one of the parties to the Clerk of the U. S. District Court, and ordered the Clerk of the U. S. Court to deliver the deed to another party. Both the party giving the deed and receiving the deed were still parties to the U. S. Court action and not affected by the dismissal of the interventions. The deed, when delivered by the clerk of the district court to the prevailing party, was immediately recorded in California, where the land affected was situated, and an action brought in the California State Court to quiet title.

The California Court action resulted in judgment for the defendants, and the title thus conveyed by deed from the Clerk of the U. S. Court was defeated because of the dismissal of the intervention petitions by the U. S. Court.

The California Court of Appeals said, at page 905 of P. 2d, and at page 211 of Cal. App. 2d, as follows:

“ . . . It is perhaps true that the bankruptcy court might have ~~been~~^{then} tried, determined and adjudicated the issues between the bank and the Whiteside executors, as to the right to the delivery of the deed. If it can fairly be said it did this, the judgment of the bankruptcy court is *res adjudicata*, and although perhaps erroneous, is a bar to defendants in this action; but if, as appears to be the case, the petition was dismissed without prejudice, nothing was adjudicated thereby as against intervenors. (Citing authorities.) . . . and they have no right to appeal and are not barred thereby. (Citing Authorities.) . . .

“ . . . But when, as was the case, the intervenor's petition was dismissed 'without prejudice,' intervenors were no longer before the court. They were not parties . . . AND THE COURT HAD NO POWER TO TAKE TITLE TO THEIR LAND AWAY FROM THEM.”
(Emphasis added.)

In our *Mallonee-Fahey* case, hundreds of reconveyance deeds were deposited with the clerk of the Court below, and by order of that court delivered by the clerk to the homeowners UPON INTERVENERS' PETITIONS. Dismissal of these interveners' petitions (such as Home Investment Company) will recloud the titles thus cleared by the Court below.

Dismissal for failure “to state a claim upon which *any* relief could be granted by a federal court” (p. 46, Court

of Appeals' Opinion in No. 12511) even if done *with* prejudice is not a final decision and would only result in thousands of new actions to quiet title. The California Supreme Court so held in:

Goddard v. Security Title Insurance Co., 14 Cal. 2d 47, 92 P. 2d 804, Sup. Ct. of Calif., 1939.

Action by beneficiary against trustee and its stockholders for loss of real property conveyed to trustee as part of trust estate.

Defendants pleaded, as *res judicata*, a former final judgment of this Court of Appeals, Ninth Circuit, dismissing a complaint in Federal Court proceedings involving the same matters.

The California Supreme Court held the Federal Court proceedings, although "dismissed with prejudice," were not conclusive on the rights of the parties, regardless of the intention of the U. S. Court.

The California Supreme Court said at page 807 of P. 2d, and at page 53 of Cal. 2d:

" . . . The court's determination amounted to nothing more than that the plaintiff had failed, in the two respects mentioned above, to establish a right of recovery against the defendant by that particular complaint. THE JUDGMENT WAS BASED UPON FORMAL MATTERS OF PLEADING, AND CONCLUDED NOTHING save that the complaint, in the form in which it was then presented, did not entitle plaintiff to go to trial on the merits. Such a judgment is clearly not on the merits, and under the rules set forth above, is not *res judicata*." (Emphasis added.)

DESTROY THIS NOTE: When paid, this note, with Deed of Trust securing same, must be surrendered for cancellation, before reconveyance will be made.

Note Secured by Deed of Trust

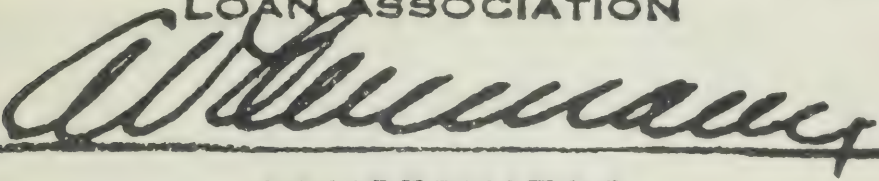
00 Long Beach California, May 28th, 1945
 I received I promise to pay to Long Beach Federal Savings and Loan Association, a Federal corporation, or its successor, the office of Long Beach Federal Savings and Loan Association, the principal sum of Forty-five Hundred and no/100 (\$4500.00) - - - DOLLARS, interest from date hereof, 1945, on unpaid principal and interest at 6 per cent per annum, interest payable monthly on the 1st day of each month, period from May 28th, 1945, to August 1st, 1945, inclusive: commencing September 1, 1945, principal and interest payable in monthly installments of Forty-five and no/100 (\$45.00) DOLLARS each, on the 1st day of each month, and continuing until said principal and interest have been paid in full.
 In the event of default, payment shall be credited first on interest then due and the remainder on principal; and interest shall be added upon the principal so credited. Should default be made in payment of any installment when due, or in violation of any agreement in the deed of trust securing the payment of this note, the whole sum of principal and interest shall become immediately due at the option of the holder of this note and shall, at the option of such holder, be paid in cash or in United States Government bonds or in any other form of money of the United States. If action be instituted on this note, I promise to pay such sum as the Court may award for attorney's fees. The holder hereof agrees to accept additional payments, provided however, that should the total of such payments equal or exceed 20 per cent of the original principal amount of the loan, 30 days unearned interest on the unpaid principal may be charged as a bonus.
 This note is secured by DEED OF TRUST to TITLE SERVICE COMPANY, A California corporation.

William Shaub
 Evelyn A. Sharp

Sample of notes aggregating \$12,000,000.00 secured by trust deeds on the homes of 8,000 borrowers. Conflicting claims caused by seizure and assignment of these notes clouded and tangled titles to borrowers' homes. (See page 9.)

PLATE 2

PAY TO THE ORDER OF THE FEDERAL HOME
LOAN BANK OF SAN FRANCISCO
LONG BEACH FEDERAL SAVINGS AND
LOAN ASSOCIATION

BY 
CONSERVATOR

Sample of endorsements by conservator of \$12,000,000.00
of notes and trust deeds on homes of 8,000 borrowers. All
endorsements were undated. (See page 9.)

The Federal Court judgment referred to is reported in 82 F. 2d 902. Justice Wilbur's opinion schedules the real properties involved, and Justice Denman's dissent predicts the final outcome of relitigation in the state courts more than three years after the Ninth Circuit Court of Appeals' opinion.

Other California cases to the same effect are:

Olds v. Peebler, 151 P. 2d 901, 66 Cal. App. 2d 76, Dist. Ct. of App., 1944.

Campanella v. Campanella, 269 Pac. 433, 204 Cal. 515, Sup. Ct. of Calif., 1928.

Dismissal of *Mallonee v. Fahey* is not required in order to permit the administrative hearing and judicial review to follow.

The titles of the 8,000 homeowners were tangled past the power of any administrative hearing to clear when Conservator Ammann, IN JUNE OF 1946, assigned \$10,000,000.00 of seized notes and deeds of trust to San Francisco Bank. A specimen of the thousands of such endorsements is shown on plate No. 2 hereof.

The administrative hearing, set for JULY 3, 1946 at Los Angeles, was "too little and too late." After such assignments only a court could clear the homeowners' titles of the conflicting claims of the San Francisco and Los Angeles Banks as well as those of the conservator and the Shareholders' Protective Committee.

Removal of the conservator by administrative order did not end his claims to act as conservator, nor his liability for so acting, and this regardless of the validity, or invalidity, of his appointment.

In July, 1949, ONE YEAR AND FIVE MONTHS AFTER the conservator had been removed, both by Order No. 388 of the appellants Home Loan Bank Board and by final judgment of the court below, appellants yet maintained that the conservator was still acting but was merely “wrongfully ousted” from control of the Association.

[R. 7030-7031, Answer of Federal Savings and Loan Insurance Corporation, July 18, 1949]:

“ . . . This defendant further states that said A. V. Ammann has continued to be and *is now* the proper and duly designated Conservator for said association but that since said January 24, 1948, said A. V. Ammann has been prevented from performing and exercising the duties of Conservator by reason of an Order of this Court entered on January 23, 1948, . . . ” (Emphasis added.)

No administrative hearing could result in anything more final than Order No. 388 (dated January 17, 1948), which read in part:

“ . . . the . . . Order . . . appointing a Conservator for the Long Beach Federal Savings and Loan Association . . . is hereby rescinded, . . . ”

No administrative hearing reviewed by a court could result in anything more final than the judgment of January 23, 1948, of the Court Below, which read in part [R. 8321, Appeal No. 12511]:

“It Is Further Ordered that possession, management, control, custody and operation, and all evi-

dences of title and/or ownership of all property, . . . real, personal, or mixed, . . . shall be transferred and moved from and by said defendant, A. V. Ammann, as such conservator . . . and shall pass and be delivered to the Long Beach Federal Savings and Loan Association. . . .”

The administrative process had been “exhausted” in a final administrative Order No. 388, removing the conservator and ordering him to account. Judicial review had proceeded to the point of judgment enforced by the removal of the conservator. No appeal was taken and the judgment was final. (Appellants’ Opening Brief, Appeal No. 12511, pp. 34-35.) The accounting was yet pending. A year and a half had passed. Yet, appellants assert to the court:

“. . . said A. V. Ammann has continued to be and is now the proper and duly designated Conservator”

The next step in this assertion would be for Ammann to reoccupy the Association’s premises, reseize its assets, and pay off the \$7,000,000.00 disputed debt to the San Francisco Bank against the will of the Long Beach shareholders and without adjudication of the debt.

With special permission of the Court of Appeals, the San Francisco Bank, in March, 1952, filed in the California State Courts, its complaint to foreclose \$7,000,00.00. The complaint asked, on page 12, line 11:

“For judgment foreclosing its aforesaid lien in the manner as provided by law.”

On page 7, lines 11 to 21, it alleges in part:

“That said defendant assigned, delivered and pledged to plaintiff . . . promissory notes secured by mortgages or deeds of trust on real property . . . as security for the repayment of said sums advanced and loaned to said defendant by said plaintiff . . . That by reason of said assignments and pledges said plaintiff became, ever since has been AND STILL IS the owner and holder of a lien upon all said pledged and assigned property.” (Emphasis added.)

In January of 1948, *after* final administrative Order No. 388, the Court removed Ammann and quieted title against him. In March of 1948, *after* final administrative Order No. 388, the Court quieted title against the San Francisco Bank as to the notes and deeds of trust. No appeal was ever taken from either of such final orders.

The District Court found in making the order quieting title against the San Francisco Bank, in part, as follows [R. 8410-8411]:

“. . . That among the injuries which would flow to said homeowners, and borrowers and purchasers by failing to require such deposit pending the final judgment in the within action, are (1) the inability of said thousands of borrowers and homeowners to secure a merchantable, or insurable title to the particular real property involved, which in turn would prevent either a sale thereof, or a loan or refinancing thereon, or a payment and termination of the interest and obligations of the present loans and deeds of

trust thereon, and (2) a multiplicity of suits which might involve all of the issues raised, or which can be raised, in the instant litigation, and all of the parties to the present litigation; which injuries and damage are found to be grave, irreparable and continuing as to the thousands of borrowers and homeowners who have given their notes and deeds of trust to said Long Beach Federal Savings and Loan Association and conveyed the titles to their homes as security for said loans.”

and ordered [R. 8533-8534]:

“The lien and obligation and charge of the claims of the Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, and/or Federal Home Loan Bank of San Francisco, and/or Federal Home Loan Bank of Los Angeles (or either or both, or the total combined amount of said claims) and either or both of the same are hereby lifted and removed from the said notes and deeds of trust and each and all of them and are transferred to, and restricted to, and shall be claims to, and obligations upon, the said sum of \$5,-300,000.00 in bonds herein ordered deposited in Court and such additional sum in money from the sum in excess of \$1,500,000.00 already in the Registry of this Court, sufficient to make the combined total sum of \$6,324,098.35 with interest on \$6,300,000.00 at 2% per annum from March 10, 1948, until paid

. . .

“ . . .

“It is further ordered that any and all endorsements appearing on each or any of the notes and trust deeds hereinafter described in favor of said Federal Home Loan Banks of San Francisco and any and/or all instruments assigning or transferring or purporting to assign or transfer said notes and/or trust deeds are hereby cancelled, and the title thereto and to each and every of such trust deeds and notes, if any title passed from said Long Beach Federal Savings and Loan Association, is hereby revested in said Long Beach Federal Savings and Loan Association.”

Thereby the thousands of endorsements (a specimen of which is Plate No. 2), were cancelled by final order of the Court below (final for four years from lack of appeal therefrom). Dismissal if now ordered by the Court of Appeals will result in, not hundreds, but actually thousands of separate quiet title actions by each individual homeowner to lift from the title to his home the tangle, removed four, or more, years ago by the District Court.

The need to “. . . order the case retained on the district court docket pending the Board’s action”¹ is imperative to save the homeowners, the shareholders, and the Association, from another seizure, with further runs, tangled titles, and complete destruction of the Association.

¹*Far East Conference v. United States* (U. S. Sup. Ct., March, 1952), 96 Adv. L. Ed. No. 10, p. 390; *Trans-Pacific Airlines v. Hawaiian Airlines*, 174 F. 2d 63 (C. C. A. 9, 1949).

II.

ADMINISTRATIVE HEARING REFUSED BY APPELLANTS
ALTHOUGH DEMANDED BY ASSOCIATION'S
SHAREHOLDERS.

The opinion of the Court of Appeals reverses because of "failure to exhaust administrative remedies." Apparently the court is not aware that from January 23, 1948 until September 9, 1949, a period of twenty months, appellants Home Loan Bank Board *refused* to permit any administrative hearing. Such refusal was disclosed by testimony and exhibits before the second Congressional Investigation Hearings (subsequent to the printing of the record on this appeal). Certified copies thereof, attested to by the Clerk of the Congressional Investigating Committee, are filed herewith. Reference is made to them for full particulars.

On January 20, 1948, a telegram was sent to the Home Loan Bank Board Chairman by an attorney for certain of the shareholders of the Long Beach Association. It read:

"NITE LETTER TO:

January 20 [1948]

"SAMUEL DIVERS,

Chairman, Federal Home Loan Bank Board
Washington, D. C.

"On behalf of minority shareholders of Long Beach Federal Savings and Loan Association, demand is hereby made that the administrative hearing provided by Section 206.2 of the Rules and Regula-

tions for Federal Savings and Loan System be held at earliest convenience of the Board.

“Charles T. Smith.”

“402 Jergins Trust Bldg.
Long Beach, California.”

The reply of the Home Loan Bank Board thereto, was:

“WESTERN UNION

“TA 86 WM 35

W.CP9 GOVT PD-CP WASHINGTON DC 23 1019A

1948 Jan 23 AM 753

Charles T. Smith, Linnell and Smith
401-2-3 Jergins Trust Bldg Long Beach Calif.

Under the Regulations hearing referred to in your telegram of January 20 is held at request of Associations Board of Directors. Due to recent developments it is our view that the request for such hearing is not now pending.

WILLIAM K. DIVERS

20. CHAIRMAN HOME LOAN BANK BOARD”

Thereafter, on January 20, 1948, the same attorney for said Long Beach shareholders wrote to appellant Home Loan Bank Board, in part, as follows:

“ . . . it is respectfully requested that the order made by the Federal Home Loan Bank Board on January 17, 1948, directing that the assets of said association be redelivered to the shareholders, be rescinded, and THAT PURSUANT TO SECTION 206.2 of the Rules and Regulations for the Federal Savings and Loan System, AN ADMINISTRATIVE HEARING BE HELD ON THIS MATTER.” (Emphasis added.)

In reply thereto, the Home Loan Bank Board, on January 26, 1948, wrote in part:

“ . . . the United States District Court for the Southern District of California has entered an order which, prior to an election, would return the former officers and directors of the association under the supervision of a Master in Chancery. The court order also provides that the Master in Chancery is to supervise an election to determine the directors of the institution. Under such circumstances, it does not appear that a rescission by the Board of the resolution of January 17 would accomplish a change in the situation.

“Your letter also requests that pursuant to Section 206.2 of the Rules and Regulations of the Federal Savings and Loan System that an administrative hearing be held on this matter. As indicated in my reply to your telegram of several days ago, such hearings under the Regulations are held at the request of the association's directors and it is our view that such a request is not now pending.

Very truly yours,
(Signed) Wm. K. Divers
William K. Divers,
Chairman”

Attachment.

(a copy of Home Loan Bank Board Order No. 388 removing the conservator and ordering him to account with this court was attached).

In the light of this blunt refusal on the part of the Home Loan Bank Board to conduct *any* administrative hearings even though requested by some of the shareholders of the Long Beach Association, can there be any doubt of the right of *all* parties to then have recourse to

the courts to obtain the relief denied by the Board in the refusal of the hearing?

Yet, the opinion of this Court of Appeals holds that no complaint can state a cause of action for *any* relief unless the administrative hearing has been held *and concluded*. The opinion holds that the administrative remedies must have been pursued "to their appropriate conclusion."

If the Court of Appeals' opinion becomes final, the Bank Board, by refusing its hearing, can preclude and prevent filing of any court action until after the statute of limitations has run against the rights of all parties, including the frauds of Home Loan Bank Board and its agents.

The Federal Savings and Loan Insurance Corporation has already (in May of 1951) PLEAD THE STATUTE OF LIMITATIONS against the Shareholders' Protective Committee's action for declaratory relief as to whether or not the insurance of their savings was valid and in force.

The opinion assumes that, although not a party, the Shareholders' Protective Committee would have been permitted to intervene in the administrative hearing. This assumption is completely refuted by the persistent refusal of the Home Loan Bank Board to accord certain of the Long Beach shareholders *any* administrative hearing.

The Board's refusal to proceed with the administrative hearing was, in part, based upon the fact that all parties, including the two shareholders then seeking the administrative hearing, were before the courts with all issues submitted to the Court below by general appearance by Home Loan Bank Board Order No. 388, for decision by the Court on the merits.

III.

FAILURE TO EXHAUST ADMINISTRATIVE PROCESS
IS NOT JURISDICTIONAL, NOR DOES IT RE-
QUIRE A DISMISSAL AT THIS STAGE OF THE
LITIGATION.

Exhaustion of administrative remedy is not an absolute, unfailing prerequisite to judicial proceedings. Rather it is a matter of degree under the particular facts of the individual case.

The Court of Appeals' opinion holds that the administrative hearing will be subject to court review. The San Francisco, Los Angeles, and Portland Bank case remains for decision with the court below. The newly-filed (1952) actions of the San Francisco Bank and the Federal Home Loan Bank receiver to foreclose on the \$7,000,000.00 of collateral are also pending in the court below.

Of necessity the entire case will be tried in some court sometime, but dismissal of the Mallonee action would give appellants the unconscionable advantage of defense of the statute of limitations unless failure to exhaust administrative remedies tolls the running of the statute and the accrual of any cause of action.

The United States Supreme Court has repeatedly held that cases filed in court prior to administrative determination may be retained on the docket pending administrative action. Such holdings are particularly favored when the statute of limitations threatens to prevent a decision on the merits.

Among the United States Supreme Court cases are:

Far East Conference v. United States, U. S.
....., 96 Adv. L. Ed. No. 10, page 390, decided
March 10, 1952, No. 15 Misc.

(cited in the Court of Appeals' opinion at p. 54).

The Supreme Court said:

“Having concluded that initial submission to the Federal Maritime Board is required, we may either *order the case retained on the District Court docket pending the Board's action* (citing authorities), or order dismissal of the proceeding brought in the District Court”

In our present appeal the “purpose to be served” by holding the case pending on the docket of the court below is to save the thousands of homeowners' titles from being reclouded and to require the removed conservator to account for the seized \$26,000,000.00. “A similar suit” cannot easily be initiated after the statute of limitations has run against the rights of the 16,000 shareholders.

See also:

General Amer. T. Car Corp. v. El Dorado Term. Co., 308 U. S. 422-433, 84 L. Ed. 361 (1940),

wherein the Court said at page 369:

“We have said that the Commission insists the District Court was without jurisdiction of the cause. With this we do not agree”

Further:

“When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have

stayed its hand pending the Commission's determination . . . There should not be a dismissal, but, as in *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. ed. 1472, 33 S. Ct. 916, *supra*, the cause should be held pending the conclusion of an appropriate administrative proceeding. *Thus any defenses the petitioner may have will be saved to it.*" (Emphasis added.)

See also:

El Dorado Oil Works v. United States, 328 U. S. 12, 90 L. Ed. 1053 (1946).

See also:

United States of America v. Interstate Commerce Commission, 337 U. S. 426, 93 L. Ed. 1451 (U. S. Sup. Ct. 1949).

(at page 464 of U. S. wherein Justice Frankfurter said) :

" . . . He may begin by filing his suit in court and ask the court to hold the case until he has obtained an administrative determination from the Commission. There is no jurisdictional bar to such a procedure . . . Cases . . . have clearly recognized that there is jurisdiction to hold the case and this procedure has been suggested in a number of them . . . (citing authorities) . . . "

See particularly footnote No. 13, which reads in part:

" . . . This procedure has the advantage of preventing the statute of limitations from running on the shipper while awaiting Commission decision . . . "

Thompson v. Texas Mexican R. R. Co., 328 U. S. 134, 90 L. Ed. 1132, U. S. Sup. Ct., 1946. Texas State Court terminated trackage lease prior to I. C. C. hearings.

The Court said at page 1143 of L. Ed.:

“Thus, however, the case may be viewed, the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, JUDICIAL ACTION IS PREMATURE. The judgment will be reversed and the cause REMANDED so that THE CASE MAY BE HELD PENDING THE CONCLUSION OF APPROPRIATE ADMINISTRATIVE PROCEEDINGS.” (Emphasis added.)

In *Trans-Pacific Airlines v. Hawaiian Airlines*, 174 F. 2d 63, C. C. A. 9, 1949, this Court of Appeals said at page 66:

“. . . Trans-Pacific was under the jurisdiction of the Board, and the district court had no power to interfere. The District Court of Hawaii therefore had no jurisdiction to proceed, *but should have held the cause in abeyance until the board made a primary determination . . .*” (Emphasis added.)

In *S. S. W. v. Air Transport*, 191 F. 2d 658, C. C. A.-D. C., 1951, the Court said at page 664:

“. . . The District Court should retain jurisdiction of the antitrust suit while appellant seeks his remedies from the Board. . . . The District Court, which will meanwhile have retained jurisdiction of the antitrust suit, will have the benefit of these proceedings in determining the issue of antitrust violation. . . .”

On numerous occasions the U. S. Supreme Court has reversed dismissal by lower courts and ordered actions, prematurely brought, nevertheless to remain pending on the docket of the District Court until appropriate for decision.

American Federation of Labor v. Watson, 327 U. S. 582, 90 L. Ed. 873, U. S. Sup. Ct., 1946, wherein the Supreme Court said:

(P. 883 of L. Ed., p. 599 of the U. S.):

“ . . . In *Railroad Commission v. Pullman Co.*, 312 U. S. 496, 85 L. ed. 971, 61 S. Ct. 643; *Chicago v. Fieldcrest Dairies*, 316 U. S. 168, 86 L. ed. 1355, 62 S. Ct. 986, and *Spector Motor Service v. McLaughlin*, 323 U. S. 101, 89 L. ed. 101, 65 S. Ct. 152, all *supra*, we held that under such circumstances the proper course was for the District Court to retain the bill until a definite determination of the local law questions could be made by the state courts.

“ . . . The resources of equity are not inadequate to deal with the problem so as to avoid unnecessary friction . . .

“We reverse the judgment of the District Court and REMAND the cause to it WITH DIRECTIONS TO RETAIN THE BILL PENDING the determination of proceedings in the state courts in conformity with this opinion.” (Emphasis added.)

In *Spector Motor Service v. McLaughlin*, 323 U. S. 101, 89 L. Ed. 101, U. S. Sup. Ct., 1944, the Supreme Court said at page 104 of L. Ed.:

“ . . . by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.

“We think this procedure should be followed in this case. . . .

“We therefore vacate the judgment of the Circuit Court of Appeals and REMAND the cause to the District Court WITH DIRECTIONS TO RETAIN THE BILL PENDING the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with this opinion.” (Emphasis added.)

Railroad Commission of Texas v. Pullman Company, 312 U. S. 496, 85 L. Ed. 971, U. S. Sup. Ct., 1941, wherein the Court said at page 498 of U. S.:

“The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. . . .

“. . . The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication. . . .

“We therefore REMAND the cause to the district court, WITH DIRECTIONS TO RETAIN THE BILL PENDING a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion. Compare *Atlas L. Ins. Co. v. W. I. Southern, Inc.*, 306 U. S. 563, 573, 83 L. ed. 987, 994, 59 S. Ct. 657, and cases cited.” (Emphasis added.)

Dismissal now would needlessly recloud the titles of thousands of homeowners, would prevent decision on the merits of the removed conservator’s accounting; would nullify the interpleader statutes; and would require immediate refileing, in other courts, of thousands of separate actions, all seeking decisions of the very questions now

pending before the court below, and which must again come before the court for final decision upon judicial review of the administrative hearings, authorized by the Court of Appeals' opinion.

Dismissal would benefit no one except those unwilling or unable to account for their dealings with \$26,000,000.00 of the shareholders' seized assets. It would cause an overwhelming multiplicity of actions and grave hardships, and the bar of the statute of limitations would result to the shareholders, homeowners, borrowers, and others, in no way at fault in the litigation between appellants and appellees.

IV.

POWER OF A REVIEWING COURT PRIOR TO CONCLUSION OF ADMINISTRATIVE PROCEEDINGS.

The Court of Appeals' opinion decides that the administrative hearing was, in 1946, and now is, subject to judicial review. The opinion also, we respectfully urge, is erroneous if it decides that such review proceedings cannot be initiated, or any steps therein commenced, until the final conclusion of the administrative action.

The Administrative Procedure Act, Title 5, U. S. C. Section 1009, subdivision (d), reads in part:

“(d) INTERIM RELIEF.—Pending judicial review . . . Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.”

In addition to such express statutory authority, every reviewing court has inherent power,

“ . . . to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong . . .” (*Scripps-Howard v. F. C. C.*, 316 U. S. 4, 86 L. Ed. 1229, U. S. Sup. Ct., 1942.) (Cited in Court of Appeals Opinion at p. 34.)

The power of stay is not postponed until final determination of the administrative proceeding. It exists because of, and for the protection of, the subsequent right of review by the appellate or reviewing court.

In *Board of Governors of Federal Reserve v. Transamerica*, 184 F. 2d 311-326 (three opinions), C. C. A. 9, 1950, this Court of Appeals issued, in aid of its appellate jurisdiction, an *ex parte* writ of injunction during the pendency of the administrative hearing before the Federal Reserve Board, and upon hearing of the order to show cause said writ of injunction was made permanent.

This Court of Appeals said in its first opinion on pages 315 and 316:

“ . . . the jurisdiction of this court to issue an extraordinary writ in aid of its own jurisdiction is not delayed until the jurisdiction of this court is actually invoked. The writ may be issued to prevent frustration of the ultimate exercise of its jurisdiction even before an appealable or reviewable order has been entered in the tribunal below. . . .

“ . . . our power to protect that jurisdiction is comparable to that of a district court which is confronted with a threat by litigants, or by third persons, to destroy its jurisdiction, as for example, in the case

of a threatened destruction or removal of a *res in custodia legis*. . . .

“ . . . To say that under the circumstances no court could do anything would lead to complete frustration”

In *Barber Asphalt Paving Co. v. Morris*, 132 Fed. 945, C. C. A. 8, 1904, the appellate court said:

“ . . . The primary reason for the grant to the federal appellate courts of the dominant power to issue their writs . . . in the exercise of and in aid of their appellate jurisdiction was to enable them to protect that jurisdiction against possible evasions of it. It is not less evident that the grant must in many, nay, in most, cases, fail to accomplish its chief end if the power to issue the writ can be exercised only after the appellate jurisdiction has been actually invoked by an appeal or by a writ of error. . . .”

The first intimation that the Association or its shareholders had of any charges against the Association was its seizure on May 20, 1946, by the signing by conservator Ammann of his own order of appointment in the premises of the Association.

A final federal court judgment has been entered removing said Ammann from the premises, and restoring the remnants of the assets to the Association.

The judicial review of that administrative hearing (under Order No. 2015) which the Court of Appeals' opinion holds exists, will be futile and fruitless, unless enforcement of the order resulting from the administrative hearing be stayed pending court review. SUCH STAY CANNOT BE EFFECTIVE AFTER A SECOND SEIZURE OF THE

ASSOCIATION. The \$10,000,000.00 run provoked by the first seizure will be modest compared to the public hysteria and panic occasioned by a second unannounced seizure, followed by an attempt by a reviewing court to remove the seizing officers and the explosion of legal proceedings incident thereto.

The stay power of the reviewing court is helpless unless this Court of Appeals

“ . . . order the case retained on the district court docket pending the board’s action. . . .” (*Far East Conference v. U. S., Sup. Ct.*, March, 1952, 96 Adv. L. Ed. No. 10, page 390; *Trans-Pacific Airlines v. Hawaiian Airlines*, 174 F. 2d 63, C. C. A. 9, 1949.)

If the administrative hearing, which will result in two trials rather than one, must be endured as ordered by the Court of Appeals, surely two seizures with the attendant runs, creation of \$7,000,000.00 liabilities, assignments and transfers of \$14,000,000.00 of seized assets in defiance of restraining orders, must not be the burden of the Association and its shareholders, in order to obtain the right of judicial review expressly granted by Congress in the Administrative Procedure Act.

Particularly it seems unjust to endure these burdens of confiscation and oppression when, as the court below has found, the public interest and the interests of the Home Loan Bank Board are fully protected by the \$1,000,000.00 bond furnished by the officers of the Association and filed with the Court Below. [Finding No. 21, R. 8233, and Finding No. 64, R. 8376.]

V.

CONSTITUTIONAL QUESTIONS ARE NOT DECIDED
WITHOUT JURISDICTION.

By settled policy, the Supreme Court refuses to consider a constitutional question if any other basis for decision can decide the appeal.

In *Alma Motor Co. v. Timken-Detroit Axle Co.*, 91 L. Ed. 128, 329 U. S. 129 (1946), at 136 of U. S., the Court says:

“This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable. . . .”

Thus, in *Aircraft, etc. v. Hirsch*, 331 U. S. 752, 91 L. Ed. 1796 (1947), and *Macauley v. Waterman Steamship Corp.*, 327 U. S. 540, 90 L. Ed. 839 (1946), exhaustion of administrative remedies, and not the constitutional questions, was the subject of Supreme Court opinions and decisions.

In *Republic Natural Gas v. Oklahoma*, 334 U. S. 62, 92 L. Ed. 1213, U. S. Sup. Ct., 1948, the Court says at page 70 of U. S.:

“. . . Appellant, of course, has the burden of affirmatively establishing this Court’s jurisdiction. . . . The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction.”

Decision of the constitutional question required jurisdiction in the Court below, on the *then* pleadings, to enter the judgment reversed by the Supreme Court, otherwise there was no constitutional question susceptible to decision by the Supreme Court. The Court of Appeals’

opinion, if it holds the District Court was without jurisdiction in 1946-1947, wipes out the *Fahey-Mallonee* decision of the U. S. Supreme Court, in 332 U. S. 245, 91 L. Ed. 2030.

VI.

SUPREME COURT PASSED ON ADEQUACY OF PLEADINGS.

The opinion states that the District Court should have dismissed all five complaints and pleadings of appellees in September of 1946, or at the latest, in the Fall of 1947, and that in not so doing, it committed error.

This opinion of the Court of Appeals is directly contrary to, and in conflict with, the result of *Fahey, et al. v. Mallonee, et al.*, in the U. S. Supreme Court in 1947.

Appellants, in their 1947 brief to the U. S. Supreme Court, made the following statements. (On p. 28, subd. (A)):

“A. JUDICIAL RELIEF IS NOT AVAILABLE UNTIL APPELLEES HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDY.

“The complaint of appellee-shareholders and of the appellee-Association should have been dismissed as premature because these appellees have not exhausted their administrative remedies.¹⁵ . . .”

(Footnote)

“15. Dismissal of these complaints would necessarily lead to dismissal of the interpleaded cross-claims which rest upon the main claims.”

Again on page 31:

“Appellees’ complaint should, therefore, have been dismissed under the ‘long settled rule of judicial

administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Macauley v. Waterman Steamship Corp.*, 327 U. S. 540; *Goldsmith v. United States Board of Tax Appeals*, 270 U. S. 117, 123; *Federal Power Comm. v. Arkansas Power & Light Co.*, this Term, No. 543, decided *per curiam* March 10, 1947. No reason appears why appellees should not have proceeded with the administrative hearing which they initiated, and if the outcome proved unsatisfactory, thereafter sought judicial relief. . . ."

The Supreme Court, however, considered the pleadings then before it and commented upon them, at page 247 of the U. S. and at page 2035 of the L. Ed.:

"Plaintiffs at once commenced this class action. . . . The complaint alleged that the Conservator and the Chairman had seized the property without due process of law, motivated by malice and ill will, and that the seizure for various reasons was in violation of the Constitution. It asked return of the Association to its former management, permanent injunction against further interference, and other relief. OTHER PARTIES IN INTEREST INTERVENED. . . .

" . . . Ammann moved to dismiss the complaint on the ground that it failed to state a cause of action. . . ." (Emphasis added.)

On page 257 of the U. S. and 2040 of the L. Ed., the Supreme Court said:

" . . . Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies.

“ . . . One of the allegations of the complaint is that it was intended that this institution would be merged with other institutions to the injury of its shareholders. . . .

“ . . . It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are alike undetermined by the courts below, and we made no determination or intimation concerning the *merits* of these issues or as to other remedies or relief than that in the judgment before us. . . .

“ . . . and this without prejudice to any other administrative or judicial proceedings which may be warranted by law. . . .” (Emphasis added.)

At the same time that this decision was rendered, there was before the U. S. Supreme Court a petition for “a writ of mandate and/or prohibition and/or injunction” against the District Court to prevent any further proceedings in the Court below with particular reference to an allowance of \$50,000.00 out of assets in the registry to the attorneys for plaintiffs, Shareholders' Protective Committee.

In *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, these writs were denied. Thereafter, on August 19, 1947, there was filed with the Court below, the mandate from the U. S. Supreme Court [R. 2302, Appeal No. 12511], which reads in part as follows:

“And It Is Further Ordered that this cause be, and the same is hereby, remanded to the said District Court for proceedings in conformity with the opinion of this Court.”

In the petition for writs of prohibition, mandamus and/or injunction, filed with the U. S. Supreme Court in April of 1947, on page 23 of the memorandum appellants state in part:

“ . . . if the court agrees with our view . . . in the interests of justice it should prevent further protracted and unnecessary litigation (undoubtedly including further appeals) by issuing the writ,”

The Supreme Court however, in passing upon this writ, said:

“ . . . We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the appropriate court”

Ex parte Fahey, 91 L. Ed. at 2043, 332 U. S. at 260.

Appellants thereafter in 1947 took such appeal (No. 11751 in this Court of Appeals, 1947).

The order of the District Court appealed from contained the finding:

“The court has jurisdiction of the parties and of the subject matter involved.”

Appellants appeal was thereafter (1948) dismissed. This finding passed upon the question of the sufficiency of the pleadings THEN before the District Court. Both the United States Supreme Court and this Court of Appeals, in 1947 and 1948, decided and acted upon such jurisdiction of the court below.

The effect of such dismissal is decided in:

United States v. Munsingwear, 340 U. S. 36, 95
L. Ed. 36, U. S. Sup. Ct., 1950.

The United States Supreme Court said:

“ . . . There is no question but that the District Court in the injunction suit had jurisdiction both over the parties and the subject matter. And its judgment remains unmodified . . . The question . . . having been determined in the first suit, is therefore laid at rest by a principle which seeks to bring litigation to an end and promote certainty in legal relations.

“In this case the United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights.

“ . . .

“The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation.

“Affirmed.”

Every original pleading condemned by the opinion of the Court of Appeals as not stating a cause of action sufficient to grant *any* relief was likewise before the U. S. Supreme Court in 1946, was attacked by appellants and dismissal thereof sought. The Supreme Court, in its opinion, expressly mentioned the motion to dismiss by defendant Ammann. The attack was unsuccessful. Nowhere in the Supreme Court opinion or in the mandate is there

one word as to dismissal of the action either for failure to exhaust administrative remedies or otherwise. The very citations of authority relied upon by the Court of Appeals as authority for now, six years later, dismissing the action, the Supreme Court then refused to dismiss, were cited to, and considered by, the Supreme Court, and did not persuade the Supreme Court to make any order of dismissal.

The Supreme Court certainly, had it intended dismissal, could have used appropriate language in either the opinion or the mandate to order such dismissal at that time. If the complaints were so fatally defective that they not only failed to state a cause of action, but could not under any circumstances ever be amended to state a cause of action, the Supreme Court would have directed dismissal in its mandate or in its opinion, and ordered the litigation then terminated.

Four of the pleadings condemned by the Court of Appeals' opinion as failing to state a cause of action, and which "should have been dismissed in September of 1946," are yet in the *identical form* in which they were considered by the Supreme Court. They are:

1. Third-Party Complaint, of Long Beach Federal Savings and Loan Association, filed July 1, 1946 [R. 286-302];

2. Answer and Cross-claim in Interpleader, of Title Service Company, filed June 4, 1946 [R. 43-56];

3. Complaint by Intervener Home Investment Co. of Long Beach, a Corporation, filed July 8, 1946 [R. 260-279];

4. Answer and Cross-claim in Interpleader of Robert H. Wallis, filed June 12, 1946 [R. 86-100].

The Supreme Court, when it desires a case dismissed, is able to say so. Its views on opinions or mandates which do not expressly direct dismissal are stated in:

Rogers v. Hill, 289 U. S. 582, 77 L. Ed. 1385, U. S. Sup. Ct., 1933.

The Supreme Court said at page 1389 of L. Ed.:

“Moreover, if the court intended to direct dismissal, it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose . . .”

VII.

COMPLAINTS DID STATE CAUSE OF ACTION.

The Court of Appeals states at page 52 of the opinion, that the original complaints, cross-claims, motions, etc., fail to state a claim upon which ANY relief could be granted by a Federal Court, because the complaints did not allege the exhaustion of the administrative remedy.

The Shareholders' Complaint [R. 23], the Association's Third-Party Complaint [R. 299], and the Association's Cross-claim [R. 355], each and all did state causes of action.

The relief sought by these pleadings went beyond anything that could be accomplished as a result of any administrative hearing. The pleadings prayed judgments holding acts of Congress unconstitutional. In the meantime they sought to preserve the Association from merger, liquidation, destruction and dispersion of its assets.

Less than sixty days previously, the \$46,000,000.00 Los Angeles Bank had been instantly and permanently liquidated, merged and dissolved, without notice to anyone.

Fahey v. Mallonee, 332 U. S. 245, 91 L. Ed. 2030, U. S. Sup. Ct., 1947.

The Court said on page 257 of the U. S., and at page 2041 of the L. Ed.:

“One of the allegations of the complaint is that it was intended that this institution would be merged with other institutions to the injury of its shareholders. The allegation seems to be based on the fact that a different institution with which the management of the Long Beach institution was connected was merged by the authorities in a way that was highly objectionable to some of the shareholders and aroused concern of the public authorities. . . . The Government has assured us at the bar that there is no plan for such a merger in contemplation. Nevertheless, such a merger was enjoined. In view of the absence of a finding of the threat or of evidence to sustain one, we accept the Government’s assurance that merger will not follow”

It is indeed significant that the Supreme Court did not enunciate the doctrine that no cause of action could be stated to enjoin any mergers until after “exhaustion of administrative remedies” and final conclusion of administrative hearings.

If, as the Court of Appeals’ opinion holds, the pleadings could state no cause of action for *any* relief, then appellants are free to merge the Long Beach Association at any time they desire and thereby to frustrate all rights of judicial review.

On page 34 of the Court of Appeals' Opinion, the statement is made:

“ . . . the reviewing court would have ample authority to preserve the status of all parties”

Exercise of this exact authority was sought as part of the relief demanded by the Mallonee-Association pleadings at the initiatory stage of this litigation when the plaintiffs and the Association sought injunctions against the merger and destruction of the Association before the reviewing court could try the action.

This right of review would be fruitless, indeed, if the Association were already merged or liquidated as was the Los Angeles Bank. More than six years have passed since the summary seizure, liquidation and merger of the Los Angeles Bank and thus far the stockholders of the seized bank have had no relief whatsoever. Prevention of such merger is clearly within the power of the reviewing court BEFORE THE CONCLUSION OF THE ADMINISTRATIVE PROCEEDINGS.²

The actions in the court below should be allowed to remain pending on their docket for the purpose of protection of the parties pending review of the final administrative decision.

Some \$6,000,000.00 of United States Government Bonds, owned by Long Beach Association, were seized by San Francisco Bank, when it took the Los Angeles Bank. The Association's Third-Party Complaint [R. 286-302] sought accounting for, among other things,

²See *Board of Governors, etc. v. Transamerica*, 184 F. 2d 311-326 (three opinions) (C. C. A. 9, 1950).

the seized \$6,000,000.00 of Government Bonds. It also sought Declaratory Relief as to which bank, Los Angeles, Portland or San Francisco, existed, and in which bank Long Beach Association was a stockholder and member.

These same issues raised in the Los Angeles Bank Complaint, filed two months later in August, 1946, appear, by the Court of Appeals' opinion, to state a cause of action. Why the same matters raised in July in the Association's Third-Party Complaint, "failed to state a claim upon which *any* relief could be granted," requires clarification.

The pleadings likewise stated causes of action against other defendants dealing with the seized Los Angeles Bank-Los Beach Association assets.

Exhaustion of administrative remedies could not require that the owner of \$26,000,000.00 seized, as he alleges, in violation of the United States Constitution, must await years of delay of an administrative hearing before taking any action to save and preserve his seized property for future recovery. Administrative and judicial processes must often proceed concurrently and neither need be entirely exclusive of the other.

See:

General American Tank Car v. El Dorado Terminal, 308 U. S. 422, 84 L. Ed. 361 (1940);

Thompson v. Texas-Mexican R. Co., 328 U. S. 134, 90 L. Ed. 1132 (1946);

Smith v. Hoboken, etc., 328 U. S. 123, 90 L. Ed. 1123 (1946).

VIII.

ASSOCIATION SAVED FROM MERGER AND DISSOLUTION BY 1946 COURT ACTION.

The Court of Appeals' opinion, on page 34, states:

"The reviewing court would have ample authority to preserve the status of all parties"

but the opinion also states, on page 52, that all the original complaints, cross-claims, etc.,

"failed to state a claim upon which *any* relief could be granted by a federal court."

The original pleadings alleged an immediate threat to merge, dissipate, and break up the Long Beach Association, so as to preclude and prevent any court review or recovery of the seized Association or assets [R. 18-19, Appeal No. 12511]. A Temporary Restraining Order to prevent such merger was issued by the District Court on May 27, 1946 [R. 33-34].

Both under the inherent power of reviewing courts and the express sections of the Administrative Procedure Act, injunction or stay, preventing such mergers, was essential to protect the jurisdiction of the reviewing court, either to decide the constitutional question decided in September of 1946 by the three-judge court, and in June of 1947 by the United States Supreme Court, or to review Final Order No. 388 of the Home Loan Bank Board, removing the conservator and ordering an accounting. Merger must be prevented before it occurs.

See:

Board of Governors v. Transamerica, 184 F. 2d 311-326 (3 opinions) (C. C. A. 9, 1950).

The court below AFTER THE REMAND from the United States Supreme Court, and the Supreme Court discussion of threatened merger, made further findings in September of 1947, BEFORE ANY AMENDMENT OF THE PLEADINGS was allowed, in which it found at R. 2355-2358, as follows:

“(7) That the defendants John H. Fahey and A. V. Ammann intended to merge or consolidate the Long Beach Federal Savings and Loan Association with other financial institutions and did intend thereby to destroy its identity and goodwill and to commingle and disperse its assets and memberships by commingling them with the assets and memberships of other financial institutions, and thus render moot the questions presented in this litigation, and . . .

“(8) That the filing and prosecution of the suit herein did protect and preserve the association and its assets and funds, in that it prevented the defendants or some of them from dissipating and breaking up the Long Beach Federal Savings and Loan Association, its membership shares and organization, by merging, consolidating, re-organizing or uniting said association, or commingling said association's assets, membership shares, or members with other organizations, banks, corporations, associations, or institutions, which would thereby have caused an immediate and

irreparable loss and damage to the plaintiffs and other shareholder members of the Long Beach Federal Savings and Loan Association, . . .

“ . . .

“ . . . That in the six days from the date of seizure on May 20, 1946, of the said association's property by the appellant Ammann and the filing of the within suit on May 26, 1946, the run of withdrawals of money by shareholder members was approaching a panic and resulted in the withdrawals of approximately six million dollars (\$6,000,000.00) or at the rate of approximately one million dollars (\$1,000,000.00) a business day; that the filing of the within action on the 27th day of May, 1946, preserved the assets of said association by changing the trend of withdrawals so that in the period of approximately the next seven weeks withdrawals amounted to only two million dollars (\$2,000,000.00) or at the rate of only approximately forty-eight thousand dollars (\$48,000.00) per business day; that had said trend of withdrawals not been changed, said association would have been nearly or completely destroyed by the withdrawal of shareholder members, . . . ”

Appellants in 1947 appealed this order to the Court of Appeals for the Ninth Circuit (appeal No. 11751). The appeal was dismissed in 1948.

All of the 1946-1947 intervention proceedings in which more than \$1,500,000.00 was deposited in the registry of

the court were in aid of the court review and were “necessary and appropriate process” to “preserve the status of all parties.”

In the first intervention order granted July 13, 1946 (about six weeks after the commencement of the litigation) [R. 527], the District Court found:

“ . . . the rights heretofore existing of each and every party to this action, except as to the Intervener Home Investment Co. of Long Beach, a corporation, its successors or assigns, be and the same are hereby expressly reserved and preserved without prejudice and shall be enforced against the said sum of deposited money to all intents and purposes as though said reconveyances had not been executed and delivered pursuant to this Order.”

(\$800,000.00 was deposited to clear the titles to 174 homes under this order.)

If, as the Court of Appeals’ opinion holds, the District Court should have dismissed all five actions, INCLUDING THE HOME INVESTMENT CO. INTERVENTION TO CLEAR TITLES, the jurisdiction of that court to preserve the status of all parties, is difficult to comprehend. Final dismissal of a pending action for failure to state a claim upon which *any* relief can be granted would seem to deprive the courts at that stage, at least, from making any order to preserve the “status of all parties,” and “avoid such a suggested hazard.”

IX.

JURISDICTION DOES NOT DEPEND UPON LEGAL
SUFFICIENCY OF THE FACTS ALLEGED.

The Court of Appeals' opinion, at page 52, states:

“ . . . the original complaints, cross-claims, motions and other documents of the Mallonee-Association group failed to state a claim upon which *any* relief could be granted . . . We need not labor the point that if these original pleadings did not present a ‘case’ (a justiciable controversy) . . . the court was without jurisdiction . . . ”

Appellee respectfully urges this statement is erroneous.

In

Bell v. Hood, 327 U. S. 678, 90 L. Ed. 939, U. S. Sup. Ct., 1946,

At page 682 of the U. S., and at page 943 of the L. Ed., the United States Supreme Court said:

“Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover . . . Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided AFTER AND NOT BEFORE the court has assumed jurisdiction over the controversy. . . . ” (Emphasis added.)

In

Binderup v. Pathe Exchange, 263 U. S. 291, 68 L. Ed. 308 (1923),

the United States Supreme Court said at page 314 of L. Ed. and page 305 of U. S.:

“Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well

as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; and this JURISDICTION CANNOT BE MADE TO STAND OR FALL UPON THE WAY THE COURT MAY CHANCE TO DECIDE AN ISSUE AS TO THE LEGAL SUFFICIENCY OF THE FACTS ALLEGED any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way, upon either question, is predicated upon the existence of jurisdiction, not upon the absence of it”

Schlosser v. Welsh, 5 Fed. Supp. 993, Three-judge Statutory Court—1934.

Before Gardner and Sanborn, Circuit Judges (C. C. A. 8), and Wyman, District Judge.

“(7, 8) ‘Unsuccessful as well as successful suits may be brought’ in a federal court, and in either case THE ULTIMATE OUTCOME IS NOT THE TEST OF JURISDICTION. *The Fair v. Kohler Die Co.*, 228 U. S. 22, 33 S. Ct. 410, 411, 57 L. Ed. 716. . . .

* * * * *

“(11) Jurisdiction being assumed, it extends to the determination of all questions involved, . . . regardless of what disposition, if any, is made of the question presented upon which jurisdiction rests. (Citing authorities.)” (Emphasis added.)

Even though the District Court itself concluded that the pleadings failed to state a claim upon which any relief could be granted, and dismissed on that ground, it yet had jurisdiction to issue its injunction or stay pending final decision by the Court of Appeals or U. S. Supreme Court of that question.

Cases in which this procedure has been followed, are:

Columbia Broadcasting System v. United States,
316 U. S. 407, 86 L. Ed. 1563, U. S. Sup. Ct.
(1942).

At page 409 of the U. S. and at page 1566 of the L. Ed., the U. S. Supreme Court said:

“ . . . The case was heard by a court of three judges, which permitted the Commission and the Mutual Broadcasting Company to intervene as defendants. It granted appellees’ motion to DISMISS the complaint FOR WANT OF JURISDICTION, 44 F. Supp. 688, AND STAYED THE OPERATION OF THE COMMISSION’S ORDER pending direct appeal to this Court.”
(Emphasis added.)

While the District Court was deciding whether or not the complaints state a cause of action upon which relief could be granted, and the Court of Appeals and the Supreme Court were determining whether or not this decision was correct, jurisdiction to enjoin, pending finality of the trial court’s dismissal and also to clear the homeowners’ titles, existed in the District Court.

Decision of whether or not the complaints state a cause of action upon which relief can be granted is of itself an exercise of jurisdiction. Jurisdiction includes the power to decide the case, either on the pleadings or after trial on the facts, and it includes the power to decide the case erroneously as well as correctly. When such decision, whether erroneous or correct, becomes final, it is binding but only as to the exact pleadings dismissed.

X.

THREE JUDGE COURT PROPERLY CONVENED RE-
TAINS JURISDICTION IN ONE JUDGE TO DECIDE
THE ENTIRE CONTROVERSY INCLUDING COUN-
TERCLAIMS.

The jurisdiction of the three-judge court under old Title 28, Section 380(a) (now Title 28, U. S. C., Section 2282), was properly invoked on the constitutional question raised. Otherwise the U. S. Supreme Court, in *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, could not have decided the constitutionality of Section 5(d), Home Owners' Loan Act—the act of Congress authorizing appointment of conservators generally.

Such jurisdiction properly invoked in three judges continues in one judge for disposition of the merits of the entire controversy, particularly for decision of counter-claims or cross-claims, for damages, attorneys' fees and costs.

Dismissal by the three-judge or one-judge court, without decision of such counterclaims on the merits, is reversible error.

In *Public Service Commission of the State of Missouri v. Brashear Freight Lines, Inc.*, 312 U. S. 621, 85 L. Ed. 1083 (1941), the U. S. Supreme Court said:

“ . . . Petitioners, in their answer to respondents' complaint, counter-claimed for fees and licenses the respondents had failed to pay in the past² and later amended the counter-claim to include amounts the respondents failed to deposit with the trustee during the litigation. Ultimately, the three judge court found the Bus and Truck Law constitutional, dissolved the restraining order, dismissed the truck operators' bill, and also ordered the counter-claim dis-

missed without prejudice because of 'serious doubt as to the right of the defendants to maintain' such an action. . . ."

Further:

" . . . For as we have pointed out, the issues were appropriate for decision by the single judge of the district. There can be no question of that judge's right to deal with issues such as those here presented. . . . If petitioners had to bring actions at law, each of the seventy-six respondents might have to be made a defendant in a separate action. There is a controversy between the parties as to whether or not all of these respondents could be sued or served in the State of Missouri; to be compelled to sue some of them elsewhere would work a hardship . . . if petitioners succeed on the merits, there might conceivably be serious problems raised by the seventy-six respondents as to the portion of damages fairly attributable to each—a problem peculiarly appropriate to equity, and pre-eminently adapted to settlement by a single court. . . . The judgment of the court below is reversed and the cause is remanded for proceedings before a single district judge in conformity with this opinion."

Sterling v. Constantin, 287 U. S. 378, 77 L. Ed. 375, U. S. Sup. Ct., 1932.

Action to enjoin as violation of the Federal Constitution, order of Texas Governor calling out state militia to enforce oil curtailment program. The Supreme Court said at page 383 of L. Ed., and at page 393 of U. S.:

"As the validity of provisions of the state constitution and statutes, . . . was challenged, the application for injunction was properly heard by three

judges. . . . THE JURISDICTION of the District Court so constituted, and of this Court upon appeal, EXTENDS TO EVERY QUESTION INVOLVED, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. . . .”
(Emphasis added.)

Further at page 388 of L. Ed., and page 404 of U. S.:

“ . . . Complainants had a constitutional right to resort to the Federal Court to have the validity of the Commission’s orders judicially determined. . . .”

Further at page 385 of L. Ed., and page 397 of U. S.:

“ . . . appellants assert that the court was powerless thus to intervene and that the Governor’s order had the quality of a supreme and unchallengable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.

“If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases,”

R. R. Com. of Cal. v. Pacific G. & E. Co., 302 U. S. 388, 82 L. Ed. 319, U. S. Sup. Ct., 1938.

Three Judge Court held the order complained of unconstitutional and did not decide facts as to confiscation. The Supreme Court reversed, held the order constitutional, and remanded to the district court for trial of the merits.

The U. S. Supreme Court said at page 391 of U. S. and at page 321 of L. Ed.:

“ . . . Because of the federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as federal. . . . (Citing authorities.)”

Again at page 401 of U. S. and at page 327 of L. Ed.:

“The main issue in this litigation is whether the rates . . . are confiscatory. The District Court did not determine that issue. The District Court should determine it. The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.”

In *Sovereign, etc. v. Murphy*, 17 Fed. Supp. 650 (1936) (Before Woodrough, Circuit Judge, and Dewey and Nordbye, District Judges), the Three-Judge Court said at page 652:

“ . . . But the duty imposed on the three-judge court by the federal statute to hear and determine the plaintiff's suit for injunction against the attempted application to it of the alleged unconstitutional state tax statute carried with it the duty on the part of the same three-judge court to try the whole case. The parties cannot be relegated to piecemeal trials of the several issues joined by them in their case. . . . (Citing authorities.) . . .”

In *Firemen's Insurance Co. v. Beha*, 30 F. 2d 539 (Affirmed 278 U. S. 580, 73 L. Ed. 517), Three-Judge Statutory Court, 1928 (before L. Hand, Circuit Judge, and Knox and Thacher, District Judges), the three-Judge Court convened to hear a constitutional question and held constitutional the actions challenged, but nevertheless held

the case for trial on the non-constitutional merits. The Three-Judge Court said on page 540:

“L. HAND, Circuit Judge . . . However, unless the constitutional questions raised be colorable or fraudulent, our jurisdiction as a statutory court extends to the local question, even though we do not have to decide it. . . . (citing authorities) . . . As we are not prepared to say that the constitutional questions are merely colorable, we see no escape from disposing of the bill IN ITS ENTIRETY.” (Emphasis added.)

On page 542:

“The motion for a preliminary injunction is denied, and the stay is dissolved. IN VIEW OF THE ALLEGATIONS IN THE BILL OF THE DEFENDANT’S ARBITRARY DISCRIMINATION, IT CANNOT BE DISMISSED. Motion to dismiss denied.” (Emphasis added.) (Affirmed 278 U. S. 580, 73 L. Ed. 517.)

XI.

JURISDICTION UPON A CROSS-CLAIM IS NOT DEPENDENT UPON THE ORIGINAL COMPLAINT.

The Opinion of the Court of Appeals states at page 52:

“. . . If the relief then demanded from the Court by the Mallonee-Association Group was improperly and unlawfully granted by the Court, it is certain that the ancillary and subsidiary claims of these litigants which arose only out of the claims of Association, were without substance in law. The validity of their claims rested upon the validity of the claims of association. If the claims of association were untenable in law it is obvious that the claims of these litigants could rise no higher than their source. . . .”

No authorities are cited for this statement; there are authorities to the contrary.

In *Public Service Commission of the State of Missouri v. Brashear Freight Lines, Inc.*, 312 U. S. 621, 85 L. Ed. 1083 (1941), wherein the U. S. Supreme Court said:

“ . . . Petitioners, in their answer to respondents' complaint, counter-claimed for fees and licenses the respondents had failed to pay in the past and later amended the counterclaim to include amounts the respondents failed to deposit with the trustee during the litigation. Ultimately, the three-judge court . . . dismissed the truck operators' bill, and also ordered the counterclaim dismissed . . . ”

The U. S. Supreme Court reversed and said:

“ . . . For as we have pointed out, the issues were appropriate for decision by the single judge of the district. There can be no question of that judge's right to deal with issues such as those here presented. . . . If petitioners had to bring actions at law, each of the seventy-six respondents might have to be made a defendant in a separate action. . . . The judgment of the court below is reversed and the cause is remanded for proceedings before a single district judge in conformity with this opinion.”

In *Sunflower Oil Company v. Wilson*, 142 U. S. 313, 35 L. Ed. 1025 (1892), U. S. Supreme Court decided that jurisdiction should be retained and the entire case decided on the merits in reliance upon a Cross-Bill in equity even though the original bill by which the action was brought was dismissed and all relief denied. The Supreme Court said at page 325 of the U. S., and at page 1029 of the L. Ed.:

“Under the circumstances of this case and in view of the fact that a Court of Equity takes jurisdiction of all questions with respect to this property as an-

cillary to its jurisdiction over the main case, the dismissal of the intervening petition does not necessarily involve the dismissal of the cross-petition, and the court, having jurisdiction of the entire proceeding, may proceed to do complete justice between the parties.”

In *Railway Express v. Jones*, 106 F. 2d 341, C. C. A. 7, 1939, defendant moved to file a counterclaim which was a bill in the nature of interpleader. District Court denied the right to file the counterclaim on the ground that the original complaint failed to state a cause of action within the jurisdiction of the Federal courts.

Collector of Internal Revenue asserted a lien upon the money in the hands of the interpleader.

The Court of Appeals said at page 343:

“. . . The Railway Express’ right to file its interpleader is not established nor defeated by the merits of Plaintiffs’ claim.”

The Court of Appeals further said at page 345:

“By proceeding under the counterclaim of the Railway Express the jurisdiction of the Court will be unassailable, and the claims of all litigants may be litigated exactly the same as in a proper class suit.

“It therefore follows that as matter of wise discretion, as well as of recognizing a right which the Railway Express possessed absolutely, the court should, after the counterclaim was filed, have proceeded as provided for by the interpleader Statute.

“The orders appealed from are reversed with directions to permit the filing of the counterclaim and to proceed further in this suit on said counterclaim.”
(Emphasis added.)

See also:

San Diego Flume Co. v. Souther, 90 Fed. 164,
C. C. A.-9, 1898.

District Court dismissed both original complaint and cross-bill in equity upon the ground that the original bill of complaint stated no facts which would justify the relief prayed for. In 90 Fed. at 164, C. C. A. 9 reversed and held the cross-bill had independent grounds of federal jurisdiction, affirmed the dismissal of the original complaint, and said at page 171:

“The decree dismissing the cross-bill will be set aside, and the cause remanded to the circuit court for further proceedings in accordance with the foregoing views.”

Rehearing was sought and granted, and in 104 Fed. 706, C. C. A. 9 said at page 708:

“We have no doubt of the correctness of our former ruling, that the judgment of the circuit court should be reversed, and the cause remanded for further proceedings in accordance with these views. It is so ordered.”

Upon remand, the district court proceeded on the cross-bill alone after dismissal of the original complaint for failure to state a cause of action, and said in 112 Fed. at page 228:

“ . . . the cross-complainant is entitled to the relief prayed. There will be a decree accordingly.”

On a second appeal to the Ninth Circuit Court of Appeals, at 121 Fed. 347, the C. C. A. 9 said:

“The decree of the Circuit Court is modified by deducting therefrom the sum of \$685 . . . and as thus modified is affirmed, with costs.”

These decisions of the Ninth Circuit Court of Appeals were cited and followed in:

Vidal v. South American Securities Co., 276 Fed. 855, C. C. A. 2, 1922.

where, on rehearing, C. C. A. 2 reversed itself (and the district court) and said at page 874:

“(13, 14) As the counterclaims set up causes of action within the jurisdiction of the court as a court of equity, and within its jurisdiction as a federal court because of the citizenship of the parties, . . . they should not have been dismissed, but should have been treated as original bills upon the dismissal of the original bill. . . .” (Citing authorities.)

See also:

Isenberg v. Biddle, 125 F. 2d 741, C. C. A. D. C., 1941,

wherein the court said at page 743:

“. . . when the counterclaim seeks affirmative relief, it is sustainable without regard to what happens to the original complaint”

See also:

Barber Asphalt Corp. v. La Fera etc., 116 F. 2d
211, C. C. A. 3, 1940,

wherein the court said at page 217:

“ . . . the cause is remanded with directions to
dismiss the complaint for want of equity, to rein-
state the counterclaim and to enter judgment grant-
ing relief thereunder.”

See also:

Lion Mfg. Corp. v. Chicago Flexible etc., 106 F.
2d 930, C. C. A. 7, 1939,

wherein the court said at page 933:

“ . . . the dismissal of the bill of complaint did
not preclude a trial and determination of the issues
presented by the counterclaim and answers thereto
. . . .”

Home Investment Company interplead \$800,000.00 into Federal Court to clear the titles to 174 Southern California homes. The administrative hearing could never quiet the titles to the 174 homes. Its Congressionally-created right to interpleader relief to quiet its titles could not be repealed by failure to exhaust an administrative remedy which it did not have.

XII.

INTERPLEADERS WERE VALID REGARDLESS OF VALIDITY ON THE ORIGINAL ACTION.

The Court of Appeals in its Opinion, at page 53, states that all five of the original complaints and proceedings should have been dismissed “for the reason that they failed to state a claim upon which relief could be granted, and for the further reason that Association had failed to exhaust tendered and available administrative remedies . . .”

Home Investment Company, an entirely separate and independent corporation, a borrower from Association, cannot be precluded from interpleader relief created by the statutes of the United States because of any omission of Association.

The right of one met by conflicting and contradictory claims and demands to obtain the relief of interpleader is not dependent upon the validity, merits or good faith of either or both of the conflicting claims. This must of necessity be so, for it would be unusual if BOTH of the conflicting claimants should eventually BOTH recover the total amount due to only one of them. In *Hunter*

v. Federal Life Insurance Company, 111 F. 2d 551, C. C. A. 8, 1940, at page 556, the Court of Appeals says:

“The jurisdiction of a Federal Court to entertain a bill of interpleader is not dependent upon the merits of the claims of the defendants”

In *Railway Express v. Jones*, 106 F. 2d 341 (C. C. A. 7, 1939), the Court of Appeals said at page 343:

“The Railway Express’ right to file its interpleader is not established nor defeated by the merits of plaintiffs claim By proceeding under the counterclaim of the Railway Express the jurisdiction of the Court will be unassailable”

In *Metropolitan Life v. Segartis*, District Court of Pennsylvania, 1937, 20 Fed. Supp. 739, the Court says at page 741:

“ . . . the jurisdiction of this court to entertain an interpleader bill does not depend upon the validity or even bona fides of the claims of the respective defendants. It is obvious that in almost every case the claim of one of the parties will ultimately be determined to be invalid. That, however, is a matter for determination at the trial and cannot affect the jurisdiction of the court”

In *Massachusetts Life v. Edner*, District Court of Pennsylvania, 73 Fed. Supp. 300 (1947), the Court said at page 303:

“ . . . the right to an interpleader, under the aforesaid Act is not dependent upon the good faith of both claimants or the strength of their claims”

Home Investment Company was wholly indifferent as to whether it paid Ammann or paid the Association, but it was vitally interested that whichever one it paid was the correct one, and that it had to pay its \$800,000.00 debt only once, to one claimant, and not twice to both claimants.

The Opinion of this Court of Appeals would appear to prevent any borrower from ever obtaining clear title to his home if the Association from whom he borrowed the money refused or delayed administrative hearings.

Title tangles caused by seizures of building and loan associations and claims of unconstitutional action by the government officials often are long-drawn-out, and unless the borrowers are able to obtain prompt relief, grievous suffering may result.

In *Zottarelli v. Pacific States*, District Court of Appeal, Calif., 1949, 211 P. 2d 23, 94 Cal. App. 2d 480, the California Court said, on page 25 of the Pacific and page 483 of Cal. App. 2d:

“ . . . Although started in 1939, the Hise Case was not finally determined until January, 1945, when the United States Supreme Court refused to take jurisdiction following the action of the California Supreme Court upholding the decision of the superior court to the effect that the seizure was justified. [The Hise case was an attack upon the seizure of the Pacific State Savings and Loan as unconstitutional, etc.] During the period of this litigation the successive Commissioners were not free to settle the assets of the company, which consisted of real estate. Title insurance companies would not issue policies . . . ”

Plaintiffs, Shareholders' Protective Committee, desired to protect their Association against just such period of title tangles beyond even the powers of the courts to clear, and they, therefore, immediately brought this action in the U. S. District Court and created a forum into which, by deposits of the total amount due on the loans, the borrowers could pay off their loans in full and thereby obtain clear and marketable titles.

In September of 1947, after the remand from the U. S. Supreme Court refusing to dismiss any of the complaints, cross-claims, interpleaders, motions, etc., for failure to exhaust administrative remedies or otherwise, the District Court found, on R. 2358 (16):

"That by the maintenance of the within suit, the plaintiffs herein and their counsel have provided a means and inducement for all of the persons having loans from said association to pay said loans and secure valid reconveyances, and also to secure policies of title insurance, which were otherwise not obtainable and without which they would have had no merchantable title to their property, . . ."

Appellants appealed this order and the findings therein contained, including the finding, on R. 2354 (2):

"That the Court has jurisdiction of the persons and subject matter involved, . . ."

to this Honorable Court of Appeals for the Ninth Circuit, Appeal No. 11751 (1947).

Appellants also, in November of 1947, took their Appeal No. 11867 from the last 4 of 50 intervention orders clearing titles to the homes of approximately 500 borrowers. Both appeals were dismissed in 1948.

The opinion of the Court of Appeals that no action can be brought for *any* relief prior to exhaustion of administrative remedies and final decision by the administrative agency as to the validity of the appointment of the conservator would doom the borrowers from every seized savings and loan association to a period of years in which no court could ever clear titles to their homes under any circumstances.

The interpleader jurisdiction exercised by the court below for the clearing of these titles was all that saved the Long Beach Association from the fate of Pacific States, a period of six years when no real estate titles could be cleared EVEN WITH COURT ACTION.

Contrast this with the Home Investment Company interpleader of \$800,000.00. The Court action was filed May 27, the titles to the homes interpleaded in June, and the first order clearing such titles was made July 13, all in 1946, about six weeks after commencement of the action.

Dismissal if ordered will recloud the titles of the homes of the 8,000 borrowers cleared in 1948 by the mass interpleader into the registry of the District Court of in excess of \$14,000,000.00 in notes, deeds of trust, government bonds, etc. And all this will be done merely to insure that the administrative hearings refused for 20 months by appellant Board shall take priority over this Court's proceedings.

The Court of Appeals' Opinion holds that neither depositors nor the borrowers (homeowners) can state any cause of action for *any* relief from the courts unless and until an administrative hearing has been held and con-

cluded. When administrative hearing was demanded Home Loan Bank Board Chairman Divers said:

“Under the Regulations hearing . . . is held at request of Associations Board of Directors . . . request for such hearing is not now pending.”

For one and one-half years, the administrative hearing was thus refused. Thereby hearing both before the administrative Board and in the courts is denied to depositors and borrowers. The right to a hearing is constitutional. The holding in the opinion, denying the right to interplead, under these circumstances is unconstitutional denial of due process.

XIII.

ADMINISTRATIVE HEARINGS USURP COURTS’ POWER.

Order No. 2015 contains four specifications, every one of which was pending before the court below for decision, as a result of the action by the Court in January of 1948 and subsequently, AFTER THE EXHAUSTION OF ALL ADMINISTRATIVE REMEDIES by final order No. 388, the Board’s conclusive and final administrative decision that the conservator should be removed and should account with the court.

The four grounds of Order No. 2015 are:

1. Failure to file monthly and annual reports. The Court below has found (and the finding is nowhere attacked by appellants in their briefs, nor does the Court of Appeals in its opinion hold the findings without substantial support in the evidence), that such reports can not be made by the Association until the removed con-

servator's accounting is decided by the Court below. [Finding No. 67, R. 8278-8279.] The Court further found that for the Association to make such reports would be an abandonment of its claims in the litigation. Such reports require, as an example, statements of indebtedness to the Federal Home Loan Bank. The Association denies, and the San Francisco Bank and the conservator claim, such indebtedness of in excess of \$7,000,000.00. The same principle applies to everyone of the more than 50 items of such monthly reports.

2. Failure to furnish an affidavit as to the books of the Association. The Court found [Findings 68 to 71. R. 8279-8280] that such affidavit was given, and the record discloses a receipt for such affidavit from the appellants' Chief Examiner to the President of the Association, and was filed with the Court below.

3. Failure of the Association to pay premiums to Federal Savings and Loan Insurance Corporation. The Court found [Findings Nos. 48 and 49, R. 8266] that such premiums were paid into Court in interpleader, but the Association denied liability to pay premiums calculated on the \$7,000,000.00 debt of conservator Ammann to the San Francisco Bank.

4. No. 4 is a revival by appellants of the 1946 charges withdrawn in January of 1948 by rescission of Order No. 5254 appointing the Conservator and submitted to the Court by Order No. 388, where they are still pending.

As to grounds Nos. 1 and 3, the Court of Appeals' opinion nullifies orders of the Court below, first as to the accounting, an order made on the express consent of the appellants by their order No. 388, and the appointment of a Special Master, their own former attorney Ronald

Walker, to hear the accounting proceedings. No. 3, the orders of deposit of the \$36,487.25 insurance premiums, into the registry of the Court, were all then final from failure to appeal therefrom.

Yet, the Court of Appeals' opinion holds that these grounds submitted to the Court below by appellants themselves, as to No. 1, and by interpleader statutes, as to No. 3, are matters which the Home Loan Bank Board may require the Association to withdraw from the Court and submit to administrative proceedings.

XIV.

POWER OF DISTRICT COURT TO ALLOW AMENDMENTS.

The Court of Appeals' opinion condemns the District Court for allowing the action to remain pending after September 1947, and for permitting amendments after the Supreme Court remand which did not direct dismissal.

The statutory three-judge court (Justice Orr, C. C. A. 9; Judge Ling, Arizona; Judge Hall, S. D. Calif.) on September 9, 1946, unanimously held the Act of Congress unconstitutional. Dismissal of the action after this opinion would have been contradictory, to say the least. Dismissal by Judge Hall after the Supreme Court considered and refused to dismiss the six separate complaints, cross-claims, etc., would have been presumptuous, particularly in view of the Supreme Court's well-known ability to expressly order dismissal in its opinion and mandate when it so intends.

Refusal to give any receipts or accounting for \$26,000,-000.00 of seized cash, government bonds, and negotiable securities, is a matter which should not be decided on tech-

nicalities such as the statute of limitations, or failure to exhaust administrative remedies.

In considering refusal of an accounting under somewhat similar circumstances in:

Rogers v. Hill, 289 U. S. 582, 77 L. Ed. 1385,
U. S. Sup. Ct. (1933),

the U. S. Supreme Court said at page 587 of U. S.:

“ . . . The opinion of the Circuit Court of Appeals did indeed deal with matters affecting the merits but the decree did not extend beyond mere reversal of the order from which the appeal was taken . . .

“ . . . But, assuming it included the opinion, the mandate would not prevent the District Court in the exercise of a sound discretion from allowing plaintiff, where adequate showing made, to file additional pleadings, vary or expand the issues and take other proceedings to enforce THE ACCOUNTING sought by his bills of complaint” (Citing four U. S. Supreme Court authorities.) (Emphasis added.)

The allegations of the amended pleadings dealt at length with inadequacy, unavailability, and other defects of the administrative hearing. [R. 2991-2997, 3270-3276.]

Instead of answering the amended pleadings, appellant Home Loan Bank Board adopted its Resolution No. 388, which by its terms required a copy to be filed with the Court below, rescinding the order appointing the conservator and ordering an accounting to be made with the Court.

Appellants Home Loan Bank Board could then have renewed their motions to dismiss for failure to exhaust administrative remedies, and other dilatory pleas. Instead, they obtained extensions of time to answer, and asked “to

be excused from this hearing," when the Court was hearing the \$14,000,000.00 interpleader to clear the titles of the homes of the 8,000 borrowers. They allowed the judgment of the District Court, removing the conservator and ordering the accounting, to become final from lack of appeal.

As we have elsewhere stated at greater length, exhaustion of administrative remedies goes not to jurisdiction, but to the question of when the court should act. If appellants wanted to hold an administrative hearing (1) on their own accounting; (2) on the removal of conservator Ammann; or (3) on any other matter, from November 10, 1947, to September, 1949, only their own refusal prevented them from so doing.

January 20, 1948, *before* the District Court entered its judgment removing conservator Ammann and ordering the accounting, with full knowledge that such judgment would be entered within a matter of hours, appellants Home Loan Bank Board refused the request of two Long Beach shareholders for an administrative hearing.

The transcript of the proceedings from which the judgment removing Ammann as conservator and ordering him to account resulted is at R. 10303-10334.

Appellant Home Loan Bank Board was represented by the then U. S. Attorney, now District Judge, Honorable James M. Carter, and its principal attorney William F. McKenna. Resolution No. 388 was presented to the Court. Their attorneys read to the court a telegram, signed by the then two Board members, William K. Divers and J. Alston Adams, and a letter addressed to the conservator Ammann, and signed by Divers, Chairman of the Board. Nowhere in the telegram, nor in any of the statements of

appellants' counsel to the court, is there any mention of administrative hearings. Appellants' own attorney Ronald Walker, was appointed Special Master. A \$1,000,000.00 bond was filed with the Court by the officers of the Association [R. 3553-3556], at the request of Judge Carter, then attorney for appellants.

The election under the direction of the Court was requested by appellants, and granted.

Judge Carter, then attorney for appellants, asked the Court for an order,

“ . . . to the effect that the acts of Ammann during his occupancy be considered legal acts of a Conservator duly appointed . . . ” [R. 10332-10333.]

If appellants desired an administrative hearing on the validity of Ammann's appointment, or the legality of his acts as conservator, could they submit that issue to the Court for decision by their own attorneys' request for such an order, and yet the court be without jurisdiction to grant ANY relief?

On March 10, 1948, the Court ordered the Association to file amended pleadings after the deposit of \$14,000,000.00 in the registry of the Court. On May 28, 1948, this was done. By Order No. 388, final administrative determination had been made. Order No. 388 had been filed with the Court and the Court had made its final judgment on such order. The \$14,000,000.00 had been deposited in the registry of the Court, and both the Court order requiring the deposit [March 13, 1948, R. 8399-8525] and the order quieting the Association's title to \$8,500,000.00 of trust deeds [March 26, 1948, R. 8526-8537] were final. No appeal had been taken from any of the three judgments (1) January 23, 1948; (2) March 13, 1948; (3) March

26, 1948, and the time for appeal from all three had expired.

Administrative hearing requested in January of 1948 by two of the Association's shareholders, had been expressly refused. Yet the Court of Appeals' opinion states that none of the pleadings could state a claim upon which *any* relief could be granted (p. 51); nor could they be amended so to do (p. 40).

Enforcement of final judgments of a Federal Court does not depend upon matters of pleadings, passed upon by the Court in rendering such judgment.

RELIANCE OF APPELLEES UPON SUPREME COURT OPINION AND REMAND.

Appellees had a right to, and did, rely upon the fact that the attack made by appellants in the United States Supreme Court, upon the pleadings of all parties for failure to exhaust administrative remedies, had been unsuccessful, and that the Supreme Court had refused dismissal and had remanded the case to the District Court for further proceedings in accordance with law.

Upon that reliance upon the Supreme Court remand and opinion, appellees have amended their pleadings on successive occasions and plead to the District Court, in whose registry the assets were on deposit, their various claims for relief, particularly their claim for an accounting for the seized \$26,000,000.00. Appellees have relied upon the final judgment (agreed by all parties to this appeal to be final) of that court removing the Conservator and ordering such accounting.

If now, all these proceedings be swept away and dismissed, the statute of limitations will become available for an absolute defense to appellants.

This Court expressed real concern on the motion of the San Francisco Bank, heard on the 24th of March, 1952, that the litigation be decided ON ITS MERITS and not on any technicality, and this Court vacated a preliminary injunction WITHOUT ANY NOTICE to certain of the parties which had obtained that injunction, so as to permit San Francisco Bank to file an action in order to prevent the technical defense of the statute of limitations possibly obstructing the recovery of \$6,300,000.00.

But if the complaints of all appellees in the District Court, pending there for nearly six years and bearing the approval of the United States Supreme Court which refused to dismiss them in 1947, be now swept aside and dismissed, appellant Ammann will have escaped all liability to account (not for \$6,300,000.00) but for \$26,000,000.00 of cash, government bonds, and negotiable securities seized without even a receipt to evidence how much was taken, or from whom.

The Home Investment Company received orders of the District Court in 1946 clearing the titles to 174 homes. The Supreme Court refused to dismiss this interpleader or to vacate these orders, and for six years the purchasers of the property have dealt with the titles thus cleared in reliance upon that Supreme Court decision. Dismissal now, for failure to exhaust administrative remedies in 1946, would of necessity require the return of the interplead \$800,000.00 to the Home Investment Company and the reclouding of the titles to the 174 homes.

Why the failure of a lender to exhaust an administrative remedy should preclude the borrower from quieting title to his home is difficult to perceive. Even more difficult to understand is how the administrative remedy UNAVAIL-

ABLE TO THE BORROWER could clear the title to thousands of homes. Titles had been entangled by the conservator's conveyances of the deeds of trust to a Federal Home Loan Bank, the validity of whose existence was then questioned in pending litigation. The Court of Appeals has refused to dismiss the Los Angeles Bank case which therefore will probably remain pending for several additional years, and the titles to the homes of 8,000 borrowers remain clouded for that time.

XV.

ACCOUNTING.

By final judgment of the Court below (January 23, 1948), removed conservator Ammann was ordered to render to that Court and to the Shareholders' Protective Committee, whose \$26,000,000.00 in assets he had seized without receipts, a full and complete accounting. All parties to this appeal agree that this is a final judgment. (Appellants' Opening Brief, pp. 34-35.)

This accounting was within the express prayer of both ORIGINAL and AMENDED pleadings of the Shareholders' Protective Committee and of the Association. [Appeal No. 12511, R. 23, 354-355, 3089-3090, 3335.]

In *Rogers v. Hill*, *supra*, the Supreme Court said:

“ . . . the mandate would not prevent the District Court . . . from allowing plaintiff, . . . to file additional pleadings, vary or expand the issues and take other proceedings to enforce the ACCOUNTING sought by his bills of complaint.” (Emphasis added.)

Courts of equity are alert to compel trustees to account with the beneficiaries for the dealings with the assets and property of others.

Appellant, Board, by its Order No. 388, expressly directed,

“ . . . that the conservator . . . is hereby . . . directed . . . to make a full and complete accounting to said shareholders . . . with the District Court of the United States in and for the Southern District of California . . . that a certified copy of this resolution be forthwith delivered to the above named court.”

Administrative action, on the question of accounting, was thereby final, conclusive and exhausted.

The first accounting has been rejected by the Court, and decision of the objections to the second attempt to account await the outcome of this appeal.

Order No. 388 was filed in January, 1948, with the Court by appellant Board as its answer to the amended pleadings filed by Mallonee in December, 1947, and by the Association in January, 1948. It constituted a confession of judgment for an accounting. No appeal was ever taken from it.

The validity of Order No. 388 to require such accounting was one of the issues before the Court on January 23, 1948, decided by the Court when it made its final judgment ordering such accounting.

The effect of the Court of Appeals' opinion is that no shareholders' committee can ever state any cause of action for an accounting against a conservator who seizes their uncounted cash, government bonds and negotiable securities aggregating \$26,000,000.00, and refuses to re-

ceipt for them, and that both administrative agency and court orders requiring such accounting are unenforceable.

Finality of the judgment based on express final order of the administrative agency required by its terms to be filed with the Court is swept aside because of an alleged defect in pleadings; pleadings which were passed upon by the Supreme Court and by the District Court when rendering the judgment.

The Court of Appeals' opinion states, at page 55, that, ". . . Personal corruption and breach of trust for personal gain are not charged . . . in the instant case."

Counsel respectfully disagrees. The accounting objections demand justification for approximately \$160,000.00 paid or charged for "conservator's expenses" and "supervisory examinations," without substantiation or itemization whatsoever.

Payment of any comparable sum by any trustee to himself for his own services, unexplained, unauthorized, and unapproved would result in summary suspension and removal of that trustee. If explanation or justification can be made for the payment of approximately \$160,000.00 by the trustee, from the trust assets to himself, for his own services, the four (4) years which have elapsed would seem ample time for such explanation to be forthcoming.

If dismissal of the accounting proceedings be ordered the statute of limitations will probably prevent the Share-

holders' Protective Committee ever discovering what the \$160,000.00 was paid for, or to whom it was paid.

Another accounting objection demands surcharge for \$5,000,000.00 of illegal loans, made upon security falsely represented to be first liens, but actually second or junior liens. The objections charge F.H.A. and V.A. insurance of said loans is void because of falsifications by the removed conservator in applying for insurance upon such loans.

These are but two of the many charges of "personal corruption and breach of trust . . . for personal gain . . ." relief for which is sought before the Court below.

Conclusion.

For the foregoing reasons, it is respectfully submitted that Counsel should be afforded the opportunity to reargue this matter before either the full court or the same panel. If rehearing be not granted, Counsel respectfully urges the Court to make its order staying the issuance of mandate pending preparation and presentation to the Supreme Court of our Petitions for Certiorari.

Respectfully submitted,

CHARLES K. CHAPMAN,

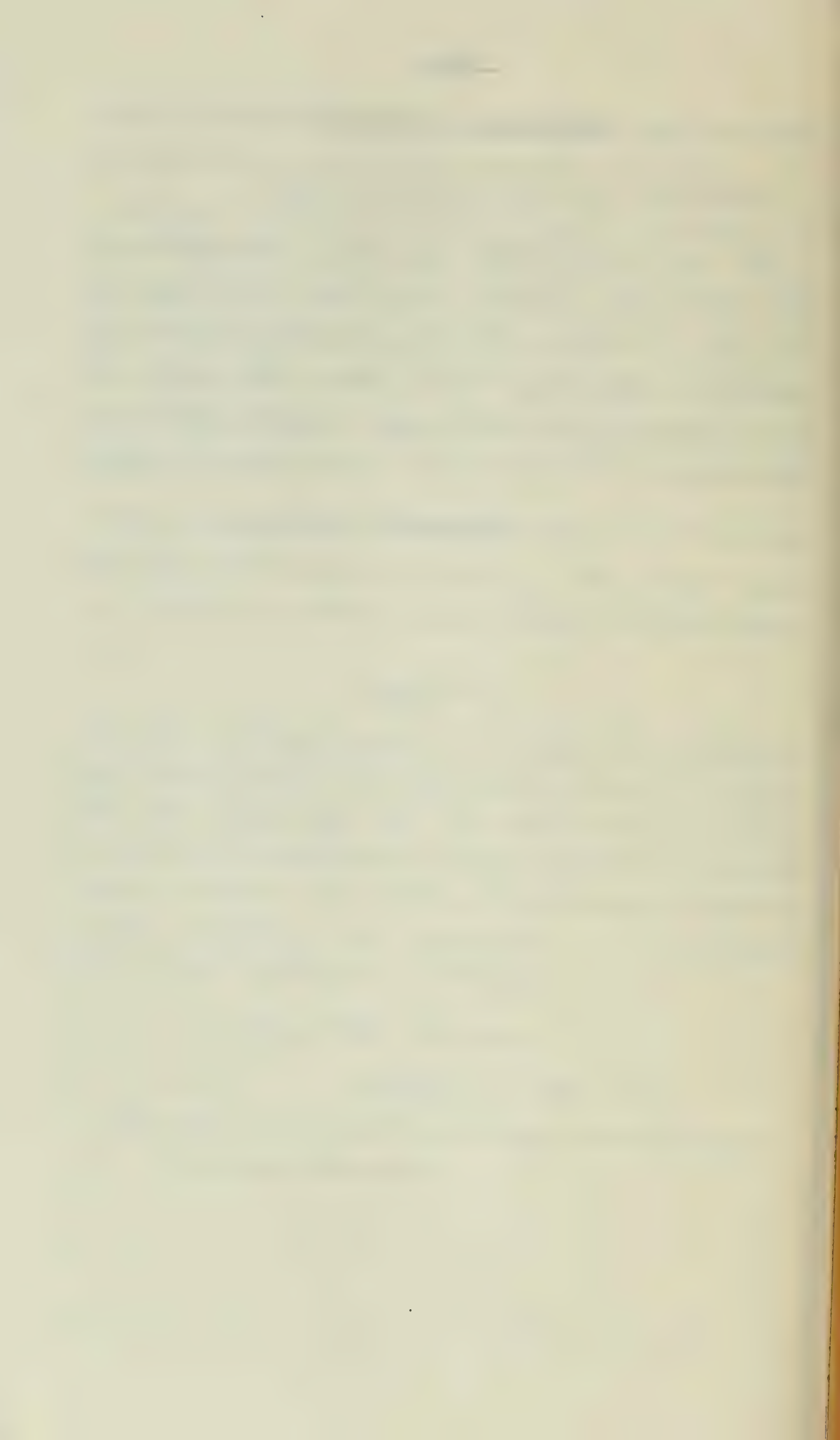
*Attorney for Appellee, Long Beach Federal Savings
and Loan Association.*

Certificate of Counsel.

CHARLES K. CHAPMAN certifies and says:

That he is the Attorney for one of the appellees in this cause, to-wit, Appellee Long Beach Federal Savings and Loan Association; that he makes this certificate in compliance with Rule 25 of the Rules of this Court; that in his judgment, the within and foregoing Petition for Rehearing is well founded and is not interposed for delay.

CHARLES K. CHAPMAN.



No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, SHAREHOLDERS PROTECTIVE COMMITTEE
OF LONG BEACH ASSOCIATION, LONG BEACH FEDERAL
SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COM-
PANY, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY,
et al.,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

HOMEOWNERS' PETITION FOR REHEARING.

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FILED

MAY 1 - 1952

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Appellees.

HOMEOWNERS' PETITION FOR REHEARING.

Home Investment Company, appellee, desires rehearing to present the question of reclouding of its titles, and those of other homeowners, aggregating several hundred homes, apart from the mass of lengthy record and briefs which seem to have obscured the Court of Appeals' consideration of this vital question of the homeowners' titles.

The Court of Appeals' opinion tends towards:

1. Dismissal for failure to exhaust administrative remedies which were non-existent as applying to these homeowners.

2. Preventing interpleader relief in court until Long Beach Association (over which homeowners have no control) seeks or exhausts administrative remedies, which under no circumstances could clear the titles for the homeowners.

3. Dismissal and setting aside judgments which have been final for over four years, and which the United States Supreme Court refused to reverse on prior appeal. (Subsequent appeals to this Court of Appeals were also dismissed.)

This appellee is wholly unconcerned with the merits of the contentions between any of the conflicting parties. It seeks but one thing on this appeal: to preserve its titles cleared by final judgments of the court below in 1946, and subsequent years, almost six years ago. It was not one of the five original parties as such parties are designated on page 53 of the Opinion of this Honorable Court. It is interested in only one thing: the clearing of its titles. It seeks no other relief.

In reliance upon those final judgments, this appellee and numerous other interveners have conveyed the titles to approximately 400 homes thus cleared, and by such conveyances (grant deeds) have warranted to all future purchasers or encumbrancers, the validity and marketability of such title.

This appellee's only part in this litigation was that it had the misfortune of being a borrower from a federal savings and loan association. In June of 1946, it sought to pay off approximately \$800,000.00 of its obligations by refinancing through another lending institution. Before the new loans could be made, reconveyances of the paid off trust deeds were required. Tender of the amount due to

appellant Ammann, the conservator, was made. Ammann's response was the titles would be forthcoming, in a few days. Thirty day escrows for the sale of the greater portion of said properties were then pending.

The next thing appellee heard, its notes and trust deeds (174 in number for approximately \$800,000.00), were in the Registry of the United States District Court at Los Angeles. No title could be obtained without an order of that Court.

To compel appellee borrower, Home Investment Company and other interveners, to await the result of an administrative hearing, to which it could not be a party, would have resulted in irreparable damage and a gross injustice.

This appellee, therefore, in July of 1946, intervened in the court proceedings, paid its \$800,000.00 into the registry of the court and secured an order of the court clearing its titles, and directing the clerk of the court to deliver to appellee's order, reconveyances of the 174 homes, security for the \$800,000.00 loaned. Numerous other interveners proceeded in a similar movement.

The Court of Appeals' opinion, on page 52, now states that appellee Home Investment Company, as one of the original actions, was not entitled to ANY relief because, among other things, the Long Beach Association had not exhausted its administrative remedies. There are also approximately 50 other interveners, representing over 200 homes, who are in the same predicament.

This appellee respectfully urges the Court of Appeals to consider that the United States Supreme Court passed upon the sufficiency of such intervention proceedings, including the order quieting appellee's titles. The Supreme

Court did not order dismissal nor in any way assail the sufficiency of the intervention-interpleader proceedings or judgment; in fact, all courts heretofore passing on said litigation have jealously guarded the rights of the homeowner.

Appellants, in their briefs to the United States Supreme Court in 1947, then urged dismissal and this appellee's counsel attended the 1947 United States Supreme Court hearings in order, if necessary, to interplead into the United States Supreme Court, the \$800,000.00 then in the Registry of the District Court. No such necessity appeared. Subsequently, more than 50 similar intervention actions were processed to conclusion without serious opposition except as to four appeals taken to this Court which were later dismissed.

If this Court of Appeals' opinion is to be followed by any order dismissing our intervention or interpleader judgments or proceedings, this appellee respectfully urges that the order direct the District Court to forthwith return to Home Investment Company the approximately \$800,000.00 deposited by it in 1946 as well as over \$500,000.00 deposited by the numerous other interveners. For only by the use of the deposited money in further proceedings before the United States Supreme Court, or elsewhere, can the homeowners' titles, cleared in 1946 and subsequent years, be protected.

Dismissal of the interpleader-intervention proceedings and voiding of the six-year-old judgments quieting titles, will of necessity recloud and re-encumber the approxi-

mately 174 homes, of this appellee and the over 200 others cleared in a similar manner, and long since sold to other innocent purchasers, and the subject of loans by other financial institutions. This appellee's and other interveners', grant deeds were made in reliance on the final judgments of the federal court in 1946, 1947, and 1948; and the covenants of clear and marketable titles implied by said grant deeds are liabilities of this appellee, the other homeowners, and of the Title Insurance Companies which insured such titles.

Unless the mandate of this Court of Appeals directs the clerk of the district court to immediately pay over the approximately \$800,000.00 plus interest, costs and attorneys' fees to this appellee upon dismissal of the actions below, as well as moneys of other interveners in the registry of the court, it is respectfully urged that issuance of such mandate be stayed for sufficient time for this appellee to take appropriate proceedings before the United States Supreme Court in order to review what it regards as an invasion and violation of the United States Supreme Court's mandate of 1947, which directed further proceedings by the District Court in accordance with the United States Supreme Court opinion.

Nowhere in such United States Supreme Court mandate, or opinion, is there any direction for dismissal of the district court proceedings, nor for reclouding of the titles of the homeowners, cleared by the judgments of the district court, WHICH WERE NOT REVERSED IN THE 1946 APPEAL TO THE UNITED STATES SUPREME COURT.

Administrative Remedy Inadequate.

The Opinion precludes one confronted with conflicting claims from obtaining statutory relief in interpleader. The borrower is compelled to suffer suspension for an indefinite period of his right to clear the title to his home by one payment into court with certainty of discharge and adequacy of the release to clear his title. The borrower is compelled to await termination of administrative proceedings which are utterly inadequate, regardless of outcome, to grant him the immediate relief available by court interpleader. No benefit is conferred on anyone and much harm and damage both to the borrower and the Association is caused by this indefinite period of suspension.

The review proceedings may not accord the borrower any relief unless they be instituted in a court having physical jurisdiction of the borrowers' homes. Only such a court can make a judgment binding upon the title. The title was clouded by the appointment of the conservator and further clouded by the conservator's conveyance of that title to the San Francisco Bank.

No administrative proceeding can clear these clouds. Only a final judgment of the court within whose territory the real property is situated can settle this question.

Interpleader makes available such a final judgment to the borrower in ADVANCE of the decision of the merits. No other process affords instantaneous and final relief to the borrower. Interpleader relief is not suspended pending adjudication on the merits by the court as to the conflict between the claimants. No reason exists why the borrowers' relief of interpleader should be suspended pending an administrative proceeding inadequate to grant the borrower any relief.

The right of judicial review postpones validity of the administrative proceeding pending further trial of the facts before the reviewing court, and at least one appeal from that reviewing court.

Exhaustion of administrative remedy is based upon the assumption that the remedy is adequate and might obviate the necessity for any court proceedings. This reason has no application to the borrower, an innocent bystander, in the conflict between the shareholders and the conservator and particularly removed from the controversy between the Federal Home Loan Banks.

Inadequacy or delay in administrative remedy has long been recognized as justification for immediate recourse to the courts for equitable, injunctive, or other relief.

See:

Railway Express v. Jones, 106 F. 2d 341 (C. C. A. 7, 1939).

(At page 343):

“ . . . The Railway Express’ right to file its interpleader is not established nor defeated by the merits of Plaintiffs’ claim . . . ”

(Again at page 345):

“By proceeding under the counterclaim of the Railway Express the jurisdiction of the Court will be unassailable, and the claims of all claimants may be litigated exactly the same as in a proper class suit.

“It therefore follows that as matter of wise discretion, as well as of recognizing a right which the Railway Express possessed absolutely, the court should, after the counterclaim was filed, have proceeded as provided for by the interpleader statute.

“The orders appealed from are reversed with directions to permit the filing of the counterclaim and to proceed further in this suit on said counterclaim”

The opinion, by denying an interpleading borrower all right to “any relief” in court pending the administrative hearing and final “administration determination,” destroys the one escape for the homeowner to clear his title. The homeowner is indifferent whether he pays the conservator, the association, the San Francisco Bank or Los Angeles Bank, but he dare not decide, except at his peril, which he will pay as it is futile to pay anyone unless and until his title is cleared by ONE PAYMENT.

Only the court in interpleader has authority to permit payment in ADVANCE OF THE DECISION OF THE MERITS. Interpleader was created by equity and later by Congressional enactment to remedy exactly this situation. A debtor, though anxious to pay his debt, is imperiled by two or more conflicting claims and demands, the merits of which may not be decided for years; there is no just reason why the borrower, who has encumbered his home, must stand helplessly by while the conservator, the Shareholders’ Protective Committee and the Los Angeles, San Francisco and Portland Banks litigate their dispute for six or more years. These are not the disputes of the borrower.

The Opinion denies to the borrower his statutory right to interplead. The borrower has no interest in the administrative hearings nor is there any reason why he should travel 3,000 miles to Washington, D. C., to intervene in a fight over who has the right to collect the debt, which the borrower admits he owes.

The first titles were cleared by the order of the court below on July 13, 1946, approximately six weeks after commencement of the litigation. The Court of Appeals' opinion also invalidates these proceedings as premature and creates a suspension of all rights to court relief pending final administrative action—final administrative action, controlled exclusively by others than the borrower in which the borrower has no voice and which he can neither institute nor terminate, and the results of which under no circumstances could grant him any relief.

The administrative process could result only in one or two decisions:

- (a) That the conservator is to remain; or
- (b) That the conservator be removed;

both of which are subject to judicial review. Even that judicial review is of no immediate aid to the borrower unless it provides him with the place for payment of his loan and securing him, thereby, clear title.

The inadequacy of the administrative process is demonstrated by the futility of its orders as affecting land titles.

Postponement of the shareholders' and association's rights until conclusion of the administrative hearing, clearly aggravates the already festering sore of unmarketable titles created BY THE SEIZURE. The right to remove an invalidly appointed or acting conservator necessitates a process available to preserve for future decisions, the claims of the litigants and at the same time to enable the borrower to be certain that ONE PAYMENT to ONE AUTHORITY is conclusive to the validity of the borrower's relief.

For the purpose of brevity, Appellee Homeowners, join in and adopt the Petitions for Rehearing filed on behalf of all other Appellees.

Conclusion.

Based on the foregoing reasons, counsel for Appellee Homeowners, respectfully requests permission to re-argue this matter before the Court in bank or a panel thereof. In the event that a rehearing be denied, counsel requests an order staying the issuance of mandate, in order to afford an opportunity for a Petition for Certiorari before the Supreme Court of the United States.

Respectfully submitted,

F. HENRY NeCASEK,

*Attorney for Appellee Home Investment Com-
pany of Long Beach, et al., Intervenors.*

Certificate of Merit.

F. Henry NeCasek, Attorney for Appellee, Homeowners, does hereby certify:

That he is attorney for Home Investment Company of Long Beach, *et al.*, Intervenors, Appellees herein; that he makes this certificate in compliance with Rule 25 of the Rules of this Court; that in his judgment the within and foregoing Homeowners' Petition for Rehearing is well-founded in law and is not interposed for the purpose of delay.

F. HENRY NeCASEK.

No. 12511.
IN THE
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FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LA-
ROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, FEDERAL HOME LOAN BANK
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GEORGE K. BRAMLEY,

Appellants,

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SAVINGS AND LOAN ASSOCIATION, LONG BEACH FEDERAL
SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COM-
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Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

PETITION OF APPELLEES FOR REHEARING.
(The Shareholders' Protective Committee.)

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Protective Committee.

MAY 1 - 1952

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Appellees.

PETITION OF APPELLEES FOR REHEARING.
(The Shareholders' Protective Committee.)

INTRODUCTION.

These appellees The Shareholders' Protective Commit-
tee of the Long Beach Federal Savings and Loan Associa-
tion (Plaintiffs below) respectfully request that a rehear-
ing be granted for the purpose of re-examining the appeal
from a "*Preliminary Injunction With Findings*" which
was made and entered by the U. S. District Court at Los
Angeles on December 1, 1949 [R. 8194, etc.].

The only matter before this Honorable U. S. Court
of Appeals for the Ninth Circuit on this Appeal No.
12511 was, and is, said "*Preliminary Injunction With*
Findings" [See Notices of Appeal, R. 8557 and R. 8559].

I.

RESEIZURE—RUN.

Conscience of counsel will not permit him to fail to respectfully advise this Honorable Court that the holding of an Administrative Hearing may, and the "Reseizure" of the Long Beach Association probably would, in the opinion of counsel, cause a new run of withdrawals of deposits which might develop into a financial panic.

Counsel for these appellees respectfully declines to accept the responsibility of such a possible calamity.

II.

CLIMATE OF LITIGATION WHEN INSTITUTED (MAY, 1946).

RUN OF 1946: The summary seizure, whether justified or not, of the solvent Long Beach Federal Savings and Loan Association on May 20, 1946, by the defendants-appellants, *et al.*, set off a run of withdrawals which reached a peak of approximately \$2,000,000.00 a day and was not completely halted until withdrawals of approximately \$10,000,000.00 had reduced the savings deposits in the Long Beach Association from approximately \$23,000,000.00 down to approximately \$13,000,000.00. Since the restoration of said Association in January, 1948, the savings deposits have been rebuilt by its re-elected management from \$13,000,000.00 (when conservator was removed) to now approximately \$34,000,000.00.

LOS ANGELES BANK MERGER (MARCH 29, 1946): Less than 60 days before the commencement of this litigation by these appellees (The Shareholders' Protective Committee of the Long Beach Association) the also solvent Los Angeles Bank had been similarly seized and merged with the Portland Bank and the name changed to the San

Francisco Bank with head office at San Francisco. Both of the said financial institutions at the times of their respective seizures were solvent with ample surplus of undivided profits (Long Beach Association had approximately \$1,300,000.00 surplus and reserves) and none of them were in danger of, or threatened with insolvency. The Association and the Los Angeles Bank, whose surplus was approximately \$1,900,000.00, were both healthy, fast growing, sound, financial institutions.

This is the climate in which the original complaint was drafted May 23 to 27, 1946, when it was filed.

III.

SHAREHOLDERS' OBJECTIVES IN LITIGATING.

1. To Stop Run.

The Long Beach Association would be completely destroyed by the mounting run of withdrawals unless public confidence could be restored by prompt effective action. A lack of confidence of the savings public in the conservator was demonstrated by the run of withdrawals. The United States Courts generally enjoy the confidence of the public. The confidence of the savings public in the United States District Court at Los Angeles was demonstrated by the subsiding of the run following the entertaining of this litigation by the said United States District Court. The run of withdrawals slowed and finally ground to a halt in September, 1946, after the savings deposits had been reduced by more than 40%. Six of the ten millions withdrawn was in the six days prior to the filing of this action and only four million in the 100 days after the U. S. District Court accepted jurisdiction.

and none after the Three Judge Court announced its decision to restore local management. (68 Fed. Supp. 418.)

2. To Prevent Merger.

In May, 1946, in the opinion of counsel then and now, there was imminent danger of an immediate merger of the Long Beach Association with another association following the pattern of the previous merger of the Los Angeles Bank with the Portland Bank. To prevent such threatened merger a temporary restraining order was immediately obtained and, after hearing, this was followed by a preliminary injunction against merger which remained in force until after opposing counsel assured the United States Supreme Court that there would be no merger. After remand, said temporary injunction was dissolved.

3. To Regain Possession.

The shareholders of the Association desired to regain possession and control of the management and operation of their own savings institution. More than 50% of the shareholders of the Association signed authorizations for the maintenance of this litigation. This purpose was accomplished in part when said Association was restored following the Administration's adoption of Order 388 on January 17, 1948, rescinding the prior Order 5254 appointing a conservator. All shareholders unanimously re-elected the former management at an election conducted by former opposing counsel U. S. Attorney, Ronald Walker, acting as Special Master supervising said election.

They have since twice unanimously re-elected substantially the same management in spite of this pending litigation and have further demonstrated their confidence in their duly elected management and in the United States Courts by redepositing their savings to the extent of approximately \$34,000,000.00.

4. To Recapture Their Property.

A substantial portion (but not all) of the property seized has been recaptured and returned following Home Loan Bank Board Order 388 and judgment of the United States District Court at Los Angeles in January, 1948. The property returned is not the same as the property seized. First liens (trust deeds) insured by Federal Housing Administration or Veterans Administration or otherwise, were seized. Substantial amounts of the notes and trust deeds returned (approximately \$5,000,000.00) are unseasoned "second" trust deeds of lower interest rates (4% and 4½% instead of 6% and 7%) and with longer maturities, some to 25 years. There is a substantial question as to whether or not such notes and "second" trust deeds negotiated by conservator Ammann are validly insured. Can the Federal Housing Administration or Veterans Administration insure second liens? Are second liens worth as much as first liens? Bonds have been substituted which have a lower market value. A substantial depletion of assets is still unexplained and unaccounted for. Whether or not there has been misappropriation of funds during the twenty months' conservatorship is still undetermined. Who actually received items aggregating approximately \$160,000.00 is still unexplained. An accounting is necessary.

5. To Quiet Title.

The assets of these shareholder depositors were seized under color of authority and claim of title as conservator. This class action was necessary to remove incumbrances and clouds from the title to both the real and personal property of these appellees (the shareholder depositors whose money it is) and of their mutual thrift Association. The action sounded *in rem* and was brought under 28 U. S. C. 118, now Section 1665, the general quiet title section of U. S. Codes. The right to the control and management of one's own property, including one's own savings, is an incident of title. Interference with such right of control and management constitutes a cloud upon the title. The test of a cloud upon the title to property is the practical effect the claim, even though unfounded, has on the title or value or lessens the chance of a free sale. (*Carney v. Commonwealth Oil and Gas Co.*, 5 Fed. Supp. 304 (1933).)

Shareholders or stockholders may sue as a class to clear the cloud of wrongfully or unlawfully executed assignments, leases, transactions, deeds, etc., from their property. (*The Citizens Savings, etc., Co. v. Illinois Central Railroad Co.*, 205 U. S. 46, 51 L. Ed. 703, 27 S. Ct. 425.)

Ammann's transfers, assignments or conveyances of approximately \$12,000,000.00 of the assets of these shareholders to the unlawfully created San Francisco Bank, whose very existence is disputed, were unlawful, wrongful, and a cloud upon the title of these shareholders and their mutually owned association, to their wrongfully conveyed assets.

These clouds upon title cannot be removed by an administrative tribunal. An administrative tribunal cannot

quiet the title of these shareholders (the actual owners) to these wrongfully conveyed assets.

The venue of the *in rem* action is where the property is located, *i. e.*, in California (*Thomas v. Emmett Irr. District*, 227 Fed. 560 (C. C. A. 9); *Commonwealth Trust Co. v. Reconstruction Finance Corp.*, 28 Fed. Supp. 586 (1939), including jurisdiction to clear title (*Jellenik v. Huron River Mining Co.*, 177 U. S. 1, 44 L. Ed. 647), and to issue temporary injunctions (*Harvey v. Harvey*, 290 Fed. 653).

There is a further now present practical phase to this subject of quiet title. Starting almost concurrently with the commencement of this litigation (June, 1946), the titles to the homes of more than 8,000 Southern California residents were clouded by defendant Ammann's unauthorized transferring, conveying, and assigning of notes and trust deeds amounting to approximately \$12,000,000.00, frequently by rubber stamp endorsements, undated and unsigned. This made necessary numerous interpleader and intervention proceedings to clear the titles to homes of borrowers who desired to pay off their loans. The first interpleader was in June, 1946, when the Home Investment Company deposited approximately \$800,000.00 in the registry of the court to pay off and clear the titles to 174 homes. During 1946 and 1947 there were more than fifty interpleader proceedings necessary to clear the titles to some 400 homes. The titles to such homes have been cleared and quieted in collateral interpleader and intervention proceedings by the United States District Court within whose territorial jurisdiction such real property is located.

Is the Home Investment Company to be given back its \$800,000.00 out of the Registry of the United States

District Court at Los Angeles and the titles to the homes represented by said 174 trust deeds and notes, to be reclouded?

Many of these homes have been resold in reliance upon the integrity of the Federal Court's final judgment in these interpleader matters.

6. To Obtain an Accounting.

One of the original purposes of the shareholders was to obtain an accounting of their savings seized by the defendant Ammann. This has not yet been accomplished, although both the Administration, by its Order 388 of January 23, 1948, rescinding Order No. 5254 appointing Ammann as conservator, and the United States District Court by its judgment of January 23, 1948, have concurred in affirming and approving this purpose of the shareholders [Par. III, R. 23].

The Administration's Restoration Order No. 388 (Note 18, p. 98, Opinion, 9 C. C. A.) and the Court's restoration judgment of January 23, 1948 [R. 8310] have never been changed, were not appealed or modified in any manner, and have now become final, as all parties agree, including appellants (App. Br. p. 35).

These shareholders are entitled to a "full and complete accounting" by defendant A. V. Ammann and his associates, irrespective of the validity or invalidity of his original appointment. The validity or invalidity of the appointment of the conservator cannot effect the requirement of his accounting as any trustee should account. Whether the take-over of May 20, 1946, was pursuant to a valid appointment or was an unlawful seizure, *i. e.*, a conversion, an accounting is necessary. The validity of Ammann's appointment may govern the degree of his ac-

countability, *i. e.*, whether he is accountable only for the exercise of reasonable care in the administration of the affairs of the Association, or whether he is to be held accountable as one who has unauthorizedly dealt with another's property, as in conversion, *i. e.*, liable for all losses and entitled to no credit for the gains.

However, under either view, Ammann should render a "full and complete account."

A full disclosure by the defendant Ammann of what properties were taken on May 20, 1946 (be it recalled that Ammann refused to give receipts for the assets taken, including uncounted cash), what was done with the properties taken, and what properties were given back, whether the same or substituted assets were returned and their values, are disclosures primarily necessary before any settlement or surcharging of the account of the defendant A. V. Ammann can be properly undertaken. One attempted accounting offered by the defendant Ammann was rejected by the United States District Court as "not a full and complete accounting" [R. 8992]. A supplement or second accounting has been tendered to which Objections have been filed by these shareholders and the Association.

(a) Charges Unitemized.

In the first accounting tendered by the defendant Ammann credit was claimed for approximately \$160,000.00 for services claimed to have been rendered by Ammann to the Association to which objections were of course made as it was not itemized. [First Ammann Account—Examiners Adjustments, p. 39—Entry 43.] In the Supplemental Accounting it is claimed that supervisory examination assessments were \$16,600.00 [page 103 of Supplement Accounting] yet at page 110 of said Supplemental Accounting three checks paid to the Federal Home Loan Bank are

listed totaling \$79,547.25 in unexplained items. Whether the difference is funds misappropriated by the defendant A. V. Ammann or someone else is of course unknown until such accounting and the objections thereto have been heard and the matter settled. Such matters are now pending before the United States District Court's Special Master. Such inconsistencies are admittedly very confusing to us and probably are confusing to this Court.

This is only an example of some of the many inconsistencies of this voluminous so-called accounting, to which 140 pages of objections have been filed.

(b) Illegal Second Loans by Ammann.

Of greater importance, are approximately \$5,000,000.00 of second trust deeds made by the defendant A. V. Ammann in renewed and renegotiated new loans. By placing two loans on the same property the aggregate of which exceeds the value of the property, the Federal Housing Administration or Veterans Administration Insurance was invalidated. It may be argued, that this is only a technicality. Nevertheless, the technicality of being a "second," instead of a first trust deed can well vitiate the Federal Housing Administration's or Veterans Administration's insurance of such loans on the grounds of misrepresentation to them by the conservator A. V. Ammann (this is irrespective of the validity or invalidity of his original appointment). A further question flows from this situation, *i.e.*: Is the Long Beach Association legally authorized to own such "second trust" deeds uninsured (if they are) by the Federal Housing Administration or the Veterans Administration.

The above six listed objectives are indicative, but not all inclusive, of the objectives of the shareholders in instituting this litigation.

IV.

COMPLAINT THEORIES.

The original complaint of these shareholders was properly described in its title to-wit: "For Return of Property, for Injunction for Declaratory Relief, and for Account" [R. 2].

The original complaint is not a model of perfect pleading. It was drafted under the compelling necessity of immediate court action to prevent a merger and destruction similar to the precedent *Los Angeles Bank* case. It was drafted in the climate of a run approaching a panic of withdrawals of deposits. It did proceed upon the theory that the unlawful seizure of the Long Beach Association "was a wilful, wanton, malicious and vindictive act" [R. 10]. * * * "In direct violation of and contrary to the Fifth Amendment of the Constitution of the United States of America" [R. 17].

The complaint thus set forth the two basic theories of:

1. Conversion of property with malice (fraudulent seizure).
2. Unconstitutionality of an enactment of Congress.

In November 1947, after argument of Motions to Dismiss, permission was granted by the United States District Court to amend the pleadings with the specific objective of spelling out with more particularity the fraudulent nature of the acts done, and tagging them with their true name and character; *i. e.*, fraud. This was done [R. 2961, First Amended and Supplemental Complaint, and R. 6798, Supplement to the First Amended and Supplemental Complaint].

V.

THREE-JUDGE STATUTORY CONSTITUTIONAL COURT VS. ADMINISTRATIVE HEARING.

Since the original complaint raised a question of constitutionality of an Act of Congress and sought injunctive relief to prevent irrevocable action thereunder pending decision (the merger of the Long Beach Association) the first question was: Which is the proper primary forum?

a. A THREE-JUDGE STATUTORY COURT, specifically created by Act of Congress for the primary purpose of determining the constitutionality of Acts of Congress where injunctive relief against their enforcement pending determination is also sought (28 U. S. C. 380a, now Secs. 2282 and 2284) which provides an expeditious direct appeal to the United States Supreme Court (now 28 U. S. C., Secs. 1253 and 2101); or

b. AN ADMINISTRATIVE HEARING before the same Administrative agency who was being accused of committing "a wilful, wanton, malicious vindictive act" under an unconstitutional statute. It is doubtful whether it could have been had as of right by the shareholders as neither the regulations nor statutes then afforded the shareholders any Administrative Hearing. To seek a non-existent Administrative remedy under the statute being attacked as unconstitutional might be claimed to be an estoppel.

That was the primary question then to be decided.

It is respectfully submitted that for the determination of the question of constitutionality of an Act of Congress, attacked as unconstitutional (Home Owners Loan Act of 1933 as amended, Sec. 5b) as distinguished from Administrative rules and regulations, the proper primary forum was, and is, the three-judge statutory court created by Act of Congress which is specifically charged with the responsibility of expeditiously determining such issues of constitutionality of statutes.

In *Jamerson & Co. v. Morgenthau*, 307 U. S. 170, 83 L. Ed. 1189 (1939), the United States Supreme Court declined to review "The Regulations and Administrative action thereunder," of the Secretary of the Treasury in denying the right to import "blended Scotch whisky" as improperly labeled. The Supreme Court held that direct appeals to it from judgments of Three Judge Statutory Courts are limited to "attacks upon an Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States."

Unconstitutionality of Rules, Regulations and Administrative Orders as such are not properly triable by a Three-Judge Statutory Court. (28 U. S. C., Sec. 380(a) now Sec. 2282; *Parker v. Tester*, 98 Fed. Supp. 300 (1951).)

The Three-Judge Statutory Court (Justices Orr, Ling and Hall) specifically refrained from, and did not, pass upon the Rules and Regulations (68 Fed. Supp. 418) nor were the Rules and Regulations before, nor passed upon by, the United States Supreme Court in *Mallonee v. Fahey*, 332 U. S. 245, 67 S. Ct. 1152, 91 L. Ed. 2030 (1947).

The primary question to be determined in this matter in May 1946 was the unconstitutionality or constitutionality of Section 5(d) of the Home Owners Loan Act as constituting an unlimited delegation of legislative authority to make regulations to deprive persons of property without due process of law and therefore repugnant to the United States Constitution generally and the Fifth Amendment in particular.

In the emergency of a \$1,000,000.00 a day run approaching a panic and the fear of complete destruction by merger or dissolution similar to the Los Angeles Bank, these appellees (the shareholders) sought the most direct and expeditious manner of solving this litigation, *i. e.*, an injunction to restrain further action (merger) pending determination of the primary question as to unconstitutionality or constitutionality of Section 5(d) of the Home Owners Loan Act of 1933 as Amended.

The forum of the Three Judge Statutory Court specifically created by Act of Congress and charged with the primary responsibility of determining the constitutionality of Acts of Congress with immediate direct appeal to the United States Supreme Court, was deemed more expeditious and appropriate than the forum of the Administrative Tribunal whose constitutional authority was being attacked.

Even now the Long Beach Association who requested such an Administrative Hearing is being charged with estoppel thereby.

VI.

JURISDICTION AFFIRMED BY U. S. SUPREME COURT IN MALLONEE v. FAHEY (SUPRA).

The United States Supreme Court entertained and passed upon the constitutionality of Section 5(d) Home Owners Loan Act of 1933 as Amended.

It is significant that the United States Supreme Court in *Mallonee v. Fahey* took cognizance of the constitutional question and decided it. Had the United States Supreme Court considered there were other questions present upon which the matter could have been decided, it would have declined to pass on the constitutionality of Section 5(d) Home Owners Loan Act of 1933 as it did in cases such as *Alma Motor Company v. Timken Detroit Axle Co.*, 329 U. S. 129, 675 S. Ct. 231, 91 L. Ed. 129 (1947); *Aircraft Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, 67 S. Ct. 1493, 91 L. Ed. 1796 (1947).

In *Mallonee v. Fahey* (332 U. S. 245), the United States Supreme Court definitely decided only two questions, although it discussed other possible issues.

It decided only that:

1. The Home Owners Loan Act of 1933, Section 5(d) was constitutional.
2. The United States District Court had jurisdiction.

The constitutionality of the act was upheld for two stated reasons, *i. e.*, (1) that it was a proper delegation of legislative authority (pp. 249-255) and (2) the plaintiffs were estopped (pp. 255 to 256).

The Supreme Court declined to decide other questions saying:

“ . . . There are other important and difficult questions raised in the case which it becomes unnecessary to decide.” (P. 256.)

It reiterated at the end of the opinion:

“We make no determination or intimation concerning the merits of these issues or as to other remedies or relief than that in the judgment before us.” (P. 257.)

Jurisdiction in the United States District Court to hear and determine the question of Constitutionality of the Act, (Sec. 5(d) H. O. L. Act) was a necessary prerequisite foundation for the Appellate jurisdiction of the United States Supreme Court to entertain the appeal.

The United States Supreme Court was there exercising its appellate jurisdiction only. It is nowhere contended that the United States Supreme Court in *Mallonee v. Fahey* (*supra*) had, or was exercising, any original or primary jurisdiction. The United States Supreme Court so stated.

“The case is here on direct appeal. 50 Stat. 752-753, 28 U. S. C. 349(a), 380(a), 28 U. S. C. A. 349(a)” (now 28 U. S. C. 1252, 1253, 2101, 2282 and 2284.)

If the United States District Court had lacked jurisdiction, the United States Supreme Court would have lacked appellate jurisdiction itself, and would have had no alternative, except to order dismissal of the entire action, leaving undecided the question of the constitutionality of Section 5(d) of the Home Owners Loan Act.

The United States Supreme Court evidently was satisfied that the United States District Court had jurisdiction, and it therefore entertained the appeal and decided the constitutionality of the Act involved.

The jurisdiction of the United States District Court was affirmed by the United States Supreme Court in *Mallonee v. Fahey* (*supra*).

VII.

JURISDICTION ONCE ACQUIRED IS NOT REVOKED BY REVERSAL OF THE DECISION OF UNCONSTITUTIONALITY.

“Because of the federal question raised by the bill of complaint, the District Court (composed of three judges convened under 28 U. S. C. A. 380) had jurisdiction to determine all the questions in the case, local as well as federal.” (Citing cases.) (Insert added.)

Railroad Comm. of California v. Pacific Gas & Electric Co. (1937), 302 U. S. 388, 82 L. Ed. 321, was “an appeal from a final decree of the District Court, composed of three judges (28 U. S. C. A. 380) permanently enjoining an order of the Railroad Commission of the State of California” as depriving the company of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The United States Supreme Court upheld the constitutionality of the procedure of Section 32 of the California Public Utilities Act (1923 Stat. 837 of Cal.), and *although reversing on the constitutional question* stated further:

“The main issue in this litigation is whether the rates as fixed by the Commission’s Order are confiscatory. The District Court did not determine that issue. The District Court should determine it. The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.”

In *Railroad Comm. of Cal. v. Pacific Gas & Electric Co.* (*supra*), the jurisdiction of the Federal District Court having been once acquired continued, although it rested solely and exclusively upon the Federal question of un-

constitutionality of the California Public Utilities Act, which was determined with finality by the United States Supreme Court holding it constitutional. The sole Federal question was thereby removed from that litigation. There was no diversity of citizenship, other Federal questions, nor Federal "sue and be sued" corporations whose stock was more than 50% owned by the United States (28 U. S. C. 1349).

Whereas in *Mallonee, et al. (of California), v. Fahey (of Massachusetts), Ammann (of Maryland), and San Francisco Bank* (whose stock was 60% owned by the United States until about 1949) there is a multiplicity of Federal questions remaining. Some Federal Enactments, the validity and construction of which are in question are listed on page 6 of this Appellee's (Shareholders) brief in Appeal 12511.

The jurisdiction of the United States District Court, upon which *Mallonee v. Fahey (supra)* rests, continues until the remaining issues are finally determined.

In *Silver v. Louisville Nashville R. R. Co.* (1909), 213 U. S. 176 at 191, 54 L. Ed. 757, 29 S. Ct. 451, the United States Supreme Court says:

"The appellants deny the jurisdiction of the Circuit Court in this case. There is no diverse citizenship in the case of this particular company and the jurisdiction must depend upon the presence of a Federal question."

Although declining to decide the Federal constitutional question the court briefly states the rule to be:

"The Federal questions as to the invalidity of the State statute because, as alleged, it was in violation

of the Federal Constitution, gave the Circuit Court jurisdiction, and having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or State questions only.

“This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit.” (Citing cases.)

Also see:

Louisville N. R. Co. v. Garrett, 231 U. S. 298 at 303, 58 L. Ed. 229 at 238, 34 S. Ct. 48;

United Fuel & Gas Co. v. Railroad Comm., 278 U. S. 300 at 307, 73 L. Ed. 390 at 395, 49 S. Ct. 150.

VIII.

SUFFICIENCY OF THE ORIGINAL COMPLAINT WAS APPROVED BY MALLONEE v. FAHEY (SUPRA).

The United States Supreme Court recognized that the issue of the sufficiency of the original complaint was tendered for its decision. The court stated:

“Ammann moved to dismiss the complaint on the ground that it failed to state a cause of action” (p. 248).

The United States Supreme Court, after specifically deciding the constitutionality of Section 5(d) Home Owners Loan Act, refused to direct dismissal of the complaint,

thus deciding, by necessary implication at least, that the complaint, even after the issue of constitutionality was decided, still stated a cause of action.

“Moreover, if the court intended to direct dismissal, it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree, and mandate generally employed for that purpose . . . We are of the opinion that the mandate did not direct dismissal.”

Rogers v. Hill, 77 L. Ed. 1385 at 1389, 289 U. S. 582 (1933).

If the United States Supreme Court was of the opinion that the Complaint, with the constitutional question removed by decision, then “failed to state a cause of action” it should have, and no doubt would have, directed dismissal of the complaint, as it did in *Far East Conference v. U. S. No. 15* (March 10, 1952), and the other cases cited in this court’s opinion at page 54.

It is significant that the Supreme Court in *Mallonee v. Fahey* (*supra*) in 1947 declined to order dismissal of the 1946 complaint “on the ground that it failed to state a cause of action” or on any other ground, but instead reversed “Without prejudice to any other administrative or judicial proceedings which may be warranted by law.”

The sufficiency of the original complaint was approved in *Mallonee v. Fahey* (*supra*).

IX.

JUDICIAL PROCEDURE AUGMENTED BY ADMINISTRATIVE HEARING (IF NEEDED).

The United States Supreme Court in *Mallonee v. Fahey* (*supra*) having settled the constitutional question with finality, and being satisfied as to the jurisdiction of the United States District Court and the sufficiency of the complaint, it declined to dismiss. Instead, it recognized the complexity of the litigation, the many issues, the local and *in rem* in character, the danger of a multiplicity of actions, and the limitations of the administrative tribunal.

The United States Supreme Court recognized the inability of an administrative tribunal, (1) to solve all of the issues of the litigation, (2) to quiet title (especially to the California Realty) and (3) to enforce its decision against persons not subject to the control of the Home Loan Bank Administration such as the thousands of California Home Owners, whose money is in court, The Home Investment Company who has \$800,000.00 in court, Mr. Wallis, who has a \$50,000.00 check in court, The Title Service Co., a California Corporation, holder of title as trustee to thousands of California Homes, and many others, including the United States District Judge whose signature would be necessary on checks to withdraw the funds from the bank account of the court's registry.

In short the United States Supreme Court in *Mallonee v. Fahey* (*supra*) recognized that further administrative

or judicial proceedings or both might be necessary. It specifically left open the question of forum when it concluded its opinion saying:

“and this without prejudice to any other administrative or judicial proceedings which may be warranted by law.”

Possibly the United States Supreme Court hoped that the Administrative Agency and the United States District Court, each in its respective field, would proceed to solve this complex litigation.

No doubt the United States Supreme Court, in deciding *Mallonee v. Fahey* (*supra*), had in mind its own, then recent, decision in *El Dorado Oil Works v. U. S.* (1946), 328 U. S. 12; 66 S. Ct. 843; 90 L. Ed. 1053, in which it had opportunity to review and observe the successful operation of the procedure it had indicated in its prior decision in the same case of *General American Tank Car Corp. v. El Dorado Terminal Co.* (1940), 308 U. S. 422-433, 84 L. Ed. 361.

There in 1940 the United States Supreme Court reversed and remanded saying:

“when it appeared in the course of the litigation that an administrative problem committed to the commissioner was involved, the court should have stayed its hand pending the commissions determination of the lawfulness and reasonableness of the practice under the terms of the act. There should not be a dismissal but as in *Mitchell Coal and Coke Co. v. Pennsylvania R. R. Co.* (*supra*), *the cause should be held pending the conclusion of an appropriate administrative proceeding.*” (Emphasis added.)

The United States Supreme Court has repeatedly held in reversing cases, even specifically for failure to exhaust administrative remedies, that the cause should be “remanded so the case may be held pending the conclusion of appropriate administrative proceedings.” (*Thomas v. Texas Mexican R. Co.* (1945), 328 U. S. 134 at 151; 90 L. Ed. 1132; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* (1913), 230 U. S. 247 at 267; 33 S. Ct. 916; 57 L. Ed. 1472.)

Trans-Pacific Airlines v. Hawaiian Airlines, etc., 174 F. 2d 63 at 66 (1949—9 C. C. A.) in which this court stated,

“The District Court of Hawaii therefore had no jurisdiction to proceed *but should have held the cause in abeyance until the Board made a primary determination, . . .*” (Emphasis added.)

The United States Supreme Court’s procedure in *Malonee v. Fahey* (*supra*) of reversing on the constitutional question alone, affirming jurisdiction, and remanding without dismissal, has been successful, at least in part, in solving some of this complex problem.

All injunctions were, of course, dissolved pursuant to the remand in the fall of 1947.

The United States District Court stayed its hand from interference with the administrative procedure until after the Administration issued its final Order 388 rescinding its prior Order 5254 appointing a conservator, and at the same time (January 17, 1948) directed that the Long Beach Association be restored and a “full and complete accounting” be filed by the conservator with the United States District Court in this action.

The administration further invited a court supervised election which was conducted by the Special Master, the former attorney for the administration. At this stage of the litigation there was far from interference by the court with the administrative process. The court's action was invited by the administrative board adopting its own resolution, removing the conservator, ordering an accounting, and requiring that a copy of that resolution be filed with the court, and that the accounting be filed with the court. Protection of this Judgment of January 23, 1948, effectuating the Board's Order 388 was the primary objective of the appealed injunction.

X.

**AN APPELLATE COURT WILL NOT DECIDE
QUESTIONS NOT BEFORE IT.**

It is presumed that this United States Court of Appeals, in the instant opinion, intended to decide only such questions as were necessary for its decision of this Appeal from a Preliminary Injunction.

The decision of the merits, on an appeal from a Preliminary Injunction, is not proper. (*Deckert v. Independent Shares Corp.* (1940), 311 U. S. 282; 85 L. Ed. 189; *Rogers v. Hill* (1933), 289 U. S. 582; 77 L. Ed. 1385; *Pendergast v. N. Y. Telephone Co.* (1923), 262 U. S. 43; 67 L. Ed. 853.)

The reversal of a Preliminary Injunction unless with a mandate to dismiss. . . .

“would not prevent the District Court in the exercise of a sound discretion from allowing plaintiff, were adequate showing made, to file additional pleadings,

vary or expand the issues, and take other proceedings to enforce the accounting sought by his bills of complaint.”

Rogers v. Hill (*supra*) which reversed the C. C. A. for affirming a dismissal which the District Court had entered pursuant to language in a prior opinion reversing a Preliminary Injunction.

XI.

SCOPE OF ADMINISTRATIVE HEARING HAS BEEN DEFINED BY JUDICIAL DECISION BRIGADED WITH ADMINISTRATIVE ACTION.

The United States Supreme Court decision in *Mallonee v. Fahey* (*supra*) and the administrative action taken by the Home Loan Bank Board in adopting Order 388 of January 17, 1948, are both final.

Order No. 388 was embodied in the appealable Judgment of January 23, 1948, which became final from lack of appeal [R. 8310]. The finality of Administration Order No. 388 “rescinding” [R. 8231] prior Order No. 5254 [R. 8229] appointing a conservator has been admitted by the appellants (App. Br. p. 35) and is not challenged by anyone.

The finality of the judgment of January 23, 1948, and Order 388 restoring the Long Beach Association to its Shareholder Owners has been relied upon and acted upon by all parties, by appellants who dismissed various appeals as “moot” (App. Br. p. 17), by thousands of borrower-homeowners, by shareholder depositors (old and new) to the extent of depositing over \$34,000,000.00 of their savings, as well as by the public generally.

The finality of Order 388 and the Restoration Judgment of January, 1948, are irrevocably established.

If any future administrative hearings are to be held their scope has been defined by the decision in *Mallonee v. Fahey* (*supra*) and Final Administrative Order 388.

The conjunctive effect of *Mallonee v. Fahey* (*supra*) and Home Loan Bank Board Order 388 is to remove from consideration of an Administrative Hearing many questions which are now determined.

Among such issues which are now determined and not open for consideration by an Administrative Tribunal are:

1. That Section 5(d) of the Home Owners Loan Act, 1933 is constitutional;

2. That the Long Beach Association be restored to its shareholders and their elected management as has been done;

3. That a "full and complete accounting" is to be rendered the shareholders for the period of the conservatorship, and to be filed in Court for approval;

4. That the jurisdiction of the United States District Court over the *res* and subject matter is established and the interplead assets are to remain in the Registry of the United States District Court, until final determination after review;

5. That the titles to the homes of Southern California borrowers cleared by United States District Court Orders, now final, are not open for re-examination or inquiry.

XII.

QUESTIONS FOR ADMINISTRATIVE
HEARING.

Unless the scope of an administrative hearing, if one is to be held, is delineated in some manner, such as herein suggested, its record, rulings, and determinations will be clouded with many questions and issues, beyond the orbit of its effective control, producing great confusion and hardship upon thousands of innocent persons.

Is an Administrative Hearing to examine, re-examine and determine such questions and issues as:

1. The constitutionality of the Home Owners Loan Act of 1933 or any of its subdivisions?

2. The validity of the interpleader proceedings whereby various Southern California property owners deposited money in the District Court's registry and received from its clerk deeds executed by Title Service Corp., a California Corp., whose claims for payment for services were transferred by court order from such properties to the funds in court?

3. Is the Home Investment Co. to receive back its \$800,000.00 from the Registry of the United States District Court?

4. Is Attorney Robert H. Wallis to recover back the \$50,000.00 cashier's check he interplead in the Registry of the United States District Court?

5. The "guilt or innocence" of Home Loan Bank Board Commissioner Kenneth G. Heisler (former Chief

Counsel) for drafting the seizure orders No. 5254 and participation in the fraudulent conspiracy to destroy a solvent financial institution, as charged?

6. The validity of the \$5,000,000.00 of Ammann renegotiated, "Second" loans?

7. The validity of the Insurance of such "second" loans by the Veterans Administration or the Federal Housing Administration, upon the misrepresentations made by Ammann that they were first liens?

8. Will the decree or decision of the Administrative Hearing be enforceable against the Veterans Administration and the Federal Housing Administration to bind them upon their contracts insuring the approximate \$5,000,000.00 of "second" loans made or renegotiated by the defendant A. V. Ammann?

9. Is the disputed termination of the hotel lease of Defendant Turner (a California citizen) who has interplead the rentals into the United States District Court, to be determined by the Administrative Hearing, whether Turner voluntarily intervenes or not?

10. Will the San Francisco, Portland and Los Angeles Banks be bound by the determination of an Administrative tribunal as to whether or not Ammann was validly appointed and duly authorized to sign the four notes for approximately \$7,000,000.00 upon which suits were recently instituted in the Superior Court of California by the San Francisco Bank and by a Receiver for it?

11. Which of the three banks, Los Angeles, Portland, or San Francisco, is the present validly existing bank or banks, in which the Long Beach Association owns approximately \$600,000.00 of stock?

12. Are the “contracts” of the Federal Savings and Loan Insurance Corporation which are represented to the public as insuring their savings deposits up to \$10,000.00, enforceable by shareholder depositors in California to protect their savings or are their claims “barred by the statute of limitations” as plead by the defendant Federal Savings and Loan Insurance Corporation?

There are, of course, many other questions as to the scope and effect of an Administrative Hearing, if one is to be held.

XIII.

CLIMATE OF LITIGATION NOW—MAY, 1952.

The constitutionality of Section 5(d) of the Home Owners Loan Act of 1933 has been upheld by *Mallonce v. Fahey* (*supra*).

The conservator Ammann has been removed by Administrative Order 388 and judgment of Court entered January 23, 1948, and effectuated under the supervision of former U. S. Attorney Ronald Walker (former opposing counsel), acting as Special Master. All parties agreed to this.

Title to the homes of approximately 8,000 California residents have been cleared by judgments of Court now final.

The conservator, whether rightly or wrongly appointed, should render a “full and complete accounting” for the \$26,000,000.00 of assets he dealt with during the twenty months of the conservatorship.

The right of these shareholders to such an accounting was recognized by the Home Loan Bank Board (Order 388), and “a full and complete accounting” was ordered

filed in this action (No. 5421, P. H.) An incomplete account was filed, found to be inadequate and a supplemental account has been filed to which objections have been filed, but which have not yet been determined.

The parties whose money is here involved are the shareholder depositors as a class. Their savings deposits now exceed \$34,000,000.00.

In their interest, as well as others, the matter should be expeditiously postured for equitable determination on the merits.

XIV. SOLUTION SUGGESTED.

It is respectfully suggested that a procedure for the expeditious determination on the equitable merits of this complex six-year-old litigation, is available.

This Court's opinion of April 2, 1952, points the way.

While we cannot agree that it was error to grant the preliminary injunction here appealed from, if this Honorable Court does ultimately reach the conclusion that the preliminary injunction should be dissolved, we respectfully suggest that the procedure indicated by the *General American Tank Car Corp. v. El Dorado Terminal Co.* (1940) (*supra*), *El Dorado Oil Works v. United States* (1946) (*supra*), and *Trans-Pacific Airlines v. Hawaiian Airlines* (1949, 9 C. C. A.) (*supra*), cases be followed.

As stated in *Scripps-Howard Radio v. Fed. Comm. Com.* (1942), 316 U. S. 4, 86 L. Ed. 1229:

"No court can make time stand still."

"The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal despite anything a court can do. But within these limits it is reasonable that an appellate court

should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong.”

Courts of review have inherent power to stay enforcement of administrative orders even during the pendency of an administrative hearing. (*Board of Governors of Federal Reserve v. Transamerica*, 184 F. 2d 311-326 (C. C. A. 9, 1950).)

Possibly that was the intention and meaning of the United States Supreme Court in *Mallonee v. Fahey* (*supra*), when it said:

“Nor do we mean to be understood that if supervisory authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies.

* * * * *

“. . . and this without prejudice to any other administrative or judicial proceedings which may be warranted by law.”

It is suggested that if the preliminary injunction is to be dissolved that:

1. The scope of the administrative hearing, if one be held, be limited to matters, properties, and parties over which it can exercise effective control. That since by Administration Order 388 and Final Judgment of January 23, 1948, the Long Beach Association has been restored to its shareholders and their elected officers, the Administration refrain from taking any action regarding the Long Beach Association until after notice and opportunity to apply for judicial review.

2. The United States District Court retain general jurisdiction of the litigation but refrain from acting upon matters within the orbit of action of an administrative hearing, except as such matters may be brought up for review under the Administrative Procedure Act, or otherwise.

Wherefore, it is respectfully requested that:

1. This petition for rehearing be granted, or
2. If denied, the cause be remanded with directions that the case be held pending the conclusion of administrative hearings, but that the issuance of the mandate be stayed pending preparation and presentation to the Supreme Court of petitions for certiorari, and,
3. If administrative hearings are held, they be limited to matters, properties, and parties over which it can exercise effective control.

Dated April 30, 1952.

Respectfully submitted,

WESTOVER & SMITH,

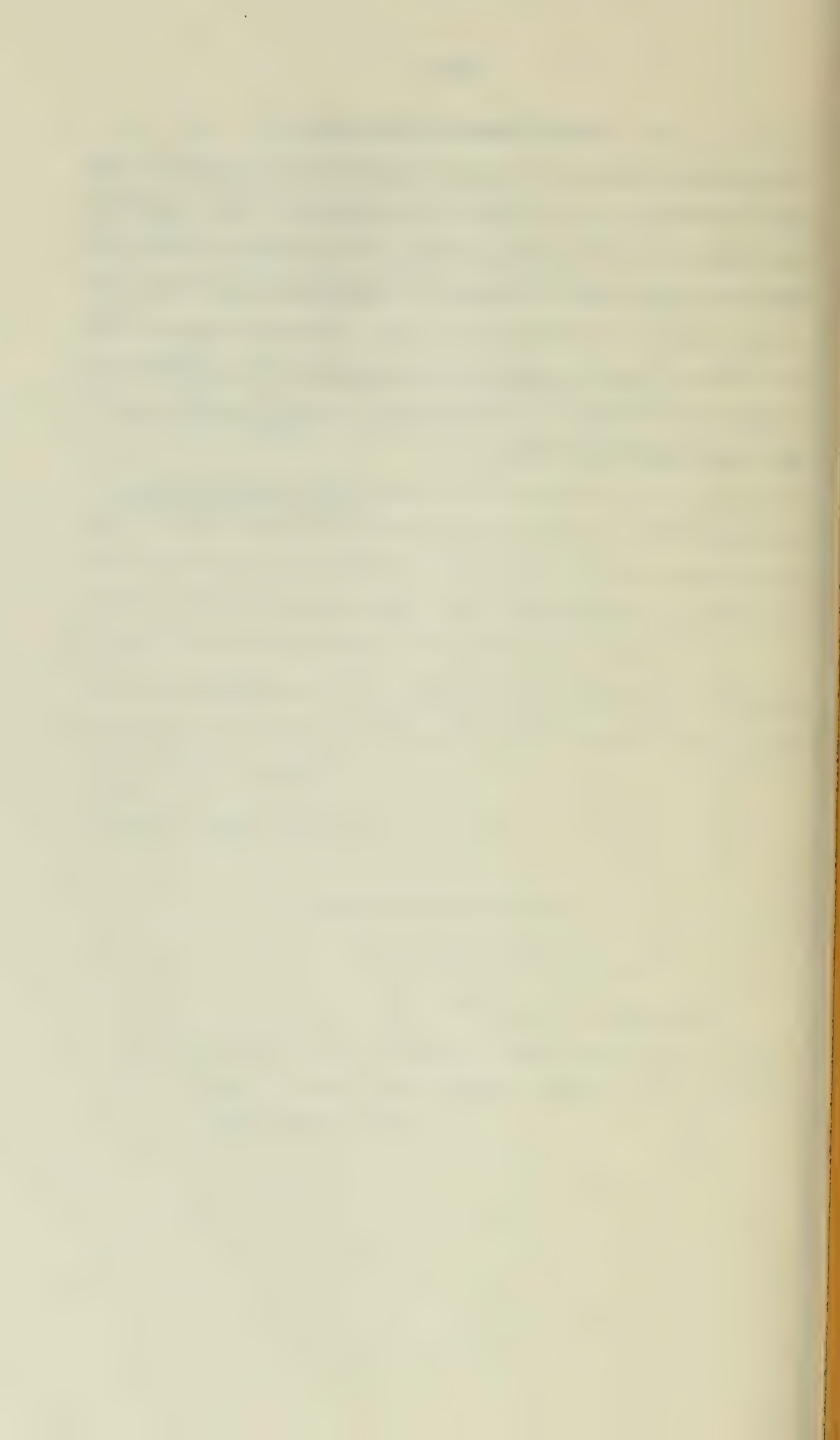
By WYCKOFF WESTOVER,

Attorneys for the Appellees, The Shareholders (as a class) of the Long Beach Federal Savings and Loan Association.

Certificate of Counsel.

Wyckoff Westover certifies that he is a member of the firm of Westover & Smith, attorneys for the appellees Mallonee *et al.*, The Shareholders' Protective Committee; that he makes this Certificate in compliance with Rule 25 of the Rules of this United States Court of Appeals for the Ninth Circuit; that in his judgment, the within and foregoing Petition for Rehearing is well founded and is not interposed for delay.

WYCKOFF WESTOVER.



No. 12511
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, SHAREHOLDERS PROTECTIVE COMMITTEE
OF LONG BEACH ASSOCIATION, LONG BEACH FEDERAL
SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COM-
PANY, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY,
et al.,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

PETITION FOR REHEARING OF APPELLEE
TITLE SERVICE COMPANY.

LYMAN B. SUTTER,

512 Jergins Trust Building,
Long Beach 2, California,

Attorney for Appellee, Title Service Company.

FILED

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FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY,
et al.,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

**PETITION FOR REHEARING OF APPELLEE
TITLE SERVICE COMPANY.**

Appellee Title Service Company petitions the Court of Appeals for a rehearing or reargument of the matters which vitally affect the titles to the homes of 8,000 homeowners in Long Beach and vicinity.

Appellee Title Service Company feels that it must have failed to demonstrate adequately to the Court of Appeals the true title situation of these homeowners, or the opinion filed by the Court of Appeals could not have contained its references to "failure to state any claim," and discussion that all pleadings should have been dismissed in 1946.

Before reclouding and rendering unmarketable the titles of the 8,000 homeowners occurs, appellee Title Service Company desires to have the opportunity to argue this single point to the Court, clear and apart from the many other complex questions of administrative law which seem to have obscured the former presentation of this point.

I.

ULTIMATE EFFECTS OF DECISION.

This Appellee, Title Service Company, does not believe the Court of Appeals actually intends the effects which will ensue from its opinion. If that opinion is followed by a mandate directing the dismissal of case No. 5421 PH. in the District Court, some of the proximate results will be to:

1. RENDER UNMARKETABLE AND RETANGLE BEYOND THE POWER OF ANY COURT TO CLEAR THE TITLES OF 8,000 HOMEOWNERS, until after final determination of administrative proceedings which may consume a period of years. (Federal Reserve Board v. Transamerica hearings have been proceeding intermittently since 1948.)

2. REPEAL BY IMPLICATION, THE RIGHT OF INTERPLEADER, and thereby require a trustee, at its peril, to determine, years in advance of final court decision, which of a group of contending claimants will eventually be successful in appeals or reviews before the United States Supreme Court; or, if the trustee declines to act pending decision of the litigation, render the trustee liable to the successful claimants for failure to determine in advance of final court decision, which claimants will be successful therein.

3. REQUIRE A VAST MULTIPLICITY AND DUPLICATION OF ACTIONS. 8,000 homeowners will be required to file

several thousand separate quiet title suits, individually, by each of the homeowners, at great expense for attorneys' fees and costs, or as an alternative, the trustee itself would be compelled to file several thousand separate actions, naming each of the 8,000 homeowners defendants, in all the different courts available, hoping that some one or more of the courts or actions would eventually be held to have jurisdiction.

This seems an unnecessary waste in the light of the expense of several hundred thousand dollars in the present litigation, which vast as it is, has at least been kept before one group of federal courts, and within channels which have cleared all homeowners' titles.

II.

HOW TITLE SERVICE COMPANY WAS BROUGHT INTO LITIGATION.

This Appellee in 1946 was tendered 174 original notes and deeds of trust, with requests for reconveyances thereof, executed by A. V. Ammann as conservator for Long Beach Association, and was shortly thereafter served with summons and complaint by the Shareholders' Protective Committee of the Long Beach Association, attacking the appointment of said A. V. Ammann as fraudulent, unconstitutional and void.

The officers of the Long Beach Association informed this Appellee of some of the circumstances of the seizure of the Long Beach Association, including the fact that Ammann had signed his own order appointing himself conservator. This Appellee was also informed that most of the \$12,000,000.00 of notes and trust deeds owned by the Association, upon which this Appellee was trustee, were being, or had been, assigned by said conservator Ammann to appellant San Francisco Bank.

This Appellee did not believe it was its duty as trustee to decide the constitutional and other questions brought before the Court by the Shareholders' Protective Committee, whose savings were represented in part by said \$12,000,000.00 of trust deeds; nor to either convey, or refuse to convey, titles to the homes of the 8,000 borrowers at the request of any ONE of the parties to the litigation.

Sued by the Shareholders' Protective Committee as a defendant, Appellee, as trustee, interplead all titles into the registry of the District Court and sought instructions as to reconveyances. Such instructions were given by the District Court on more than fifty intervention orders, and reconveyances, pursuant to such court orders, were executed by this Appellee and delivered to the clerk of the District Court in conformity with the orders of that Court.

These reconveyances have been recorded, titles to the thousands of properties cleared, and title insurance in favor of the 8,000 borrowers and homeowners, repeatedly issued by reputable title insurance companies in reliance upon said court orders and reconveyances.

This Appellee's cross-claims in interpleader were before the United States Supreme Court in the 1946-1947 appeals, and have never been amended since that time. The mandate of the United States Supreme Court to the District Court, ordered:

“ . . . further . . . judicial proceedings . . . ”

Writs of prohibition, injunction and/or mandamus against proceedings in the District Court were denied by the United States Supreme Court in 1947, and again denied by this Honorable Court of Appeals in June of 1950.

III.

NATURE OF TITLE SERVICE COMPANY'S ACTIONS AS TRUSTEE IN RELIANCE UPON THE DISTRICT COURT'S FINAL ORDERS.

Appellee Title Service Company, as trustee, under the deeds of trust on the homes of the 8,000 homeowners, has acted, and continues to act, under the instructions of the court below in reconveying such titles.

Such actions fall into two main classifications:

FIRST:

THE FIFTY OR MORE INTERVENTIONS BY WHICH IN EXCESS OF \$1,500,000.00 WAS DEPOSITED IN THE REGISTRY OF THE DISTRICT COURT TO CLEAR THE TITLES TO APPROXIMATELY 400 HOMES.

Upon these interventions, hundreds of reconveyances of title were executed by Title Service Company and deposited with the clerk of the Court. As the money (totaling approximately \$1,500,000.00) was paid into Court, the clerk of the Court delivered these reconveyances to the homeowners or their agents. The original reconveyances were recorded in the County Recorder's Office. Certified copies of the judgment of the Court were issued and filed in the County Recorder's Office, thus clearing the homeowners' titles as to these parcels.

If the money in the registry of the Court is to be returned to the borrowers and homeowners who deposited it, reinstatement of the obligations of the deeds of trust as a lien upon these real properties will be impossible.

Foreclosure of the deeds of trust to enforce payment is equally impossible. They cannot be foreclosed as deeds of trust, by sale by the trustee, because the trustee has,

by order of Court, reconveyed and released the title, and the reconveyances have been recorded. They cannot be foreclosed by court action because the statute of limitations, (four years in California, Sec. 337, Code Civ. Proc.) has expired, and in the opinion of this Appellee, any such action could and would be defeated by the plea of the statute of limitations.

The effect of dismissal upon this group of approximately \$1,500,000.00 will be to necessitate return by the Court to the homeowners of their deposited money, and at the same time leave their unpaid deeds of trust on their homes unenforceable by foreclosure or otherwise, but yet a lien and cloud upon their titles because the proceedings of the District Court are held to be without jurisdiction.

SECOND:

THE REMAINDER OF APPROXIMATELY \$10,000,000.00
OF DEEDS OF TRUST, CLEARED BY THE MASS IN-
TERPLEADER OF \$14,000,000.00 INTO THE REGISTRY
OF THE COURT IN MARCH OF 1948.

As to this second group, many have been reconveyed by issuance of reconveyances by this Appellee, pursuant to order of Court of March 26, 1948 [R. 8534],¹ which reconveyances have been recorded and titles insured by title insurance companies in reliance thereon.

¹"It is further ordered that any and all endorsements appearing on each or any of the notes and trust deeds hereinafter described in favor of said Federal Home Loan Bank of San Francisco and any and/or all instruments assigning or transferring or purporting to assign or transfer said notes and/or trust deeds are hereby cancelled, and the title thereto and to each and every of such trust deeds and notes, if any title passed from said Long Beach Federal Savings and Loan Association, is hereby revested in said Long Beach Federal Savings and Loan Association."

As to these, the statute of limitations will have run on many, but not all. Immediate court foreclosure proceedings must be instituted in some court to preserve the rights to enforce payment, if the payments made into court are held to have been invalid.

But a far bigger portion, several thousand at least, have not yet been reconveyed and are assigned, according to endorsements on the notes, by undated, rubber stamped assignment, as follows (see Plate 2):

“PAY TO THE ORDER OF THE FEDERAL HOME
LOAN BANK OF SAN FRANCISCO

LONG BEACH FEDERAL SAVINGS AND
LOAN ASSOCIATION

By A. V. AMMANN

CONSERVATOR.”

The San Francisco Bank action, filed with the approval of this Court of Appeals, presently seeks foreclosure of the lien of the San Francisco Bank on these deeds of trust. The Los Angeles Bank, by its complaint and cross-claims, has asserted its claims as to 5/6th of the \$7,300,000.00 of its seized assets, loaned by San Francisco Bank to conservator Ammann. The Receiver for Portland, San Francisco and Los Angeles Banks has commenced both State and Federal Court actions for foreclosure of the United States Government Bonds and money in the registry of the District Court. In addition the Federal Savings and Loan Insurance Corporation has asserted that Ammann is still the validly acting conservator. [Appeal No. 12511, R. 7030-7031.]

Title Service Company must therefore refuse to reconvey unless instructed by some court as to which of the

conflicting claimants of the six groups of parties it shall obey or disregard, to-wit:

- (a) San Francisco Bank;
- (b) Los Angeles Bank;
- (c) The Receiver for the Federal Home Loan Banks of Los Angeles, San Francisco, or Portland, appointed by the Court to bring, and who has brought, a foreclosure action against the assets in the registry of the District Court;
- (d) Long Beach Association;
- (e) Long Beach Shareholders' Protective Committee, Mallonee, *et al.*;
- (f) Conservator Ammann.

The San Francisco Bank-Los Angeles Bank case continues pending in the District Court, as does the San Francisco Bank's own \$7,000,000.00 foreclosure action, and likewise the foreclosure action by the Receiver for the Los Angeles, Portland and San Francisco Banks.

If the 1948 order of the District Court, quieting Long Beach Association's title to said \$10,000,000.00 of trust deeds is void from want of jurisdiction, the homeowners' payments and the Long Beach Association's requests for reconveyances are equally futile to remove these title tangles.

This Appellee will be compelled to await judgments containing instructions from some court which does have jurisdiction. If the Federal Court in interpleader is without such jurisdiction, it seems doubtful that any competent court exists. The California courts would have no process known to this Appellee to reach conservator Ammann, absent from California for more than four years last past, and who has refused to return to complete his accounting.

IV.

CONSTITUTIONAL QUESTIONS AND CONFLICTING CLAIMS ARE TO BE DECIDED BY COURTS, NOT BY THE TRUSTEE. SUCH PROCEDURE DID NOT ORIGINATE IN THIS CASE.

The constitutional question raised by the Shareholders' Protective Committee was unanimously decided in 1946, in favor of the shareholders by a three-judge court, consisting of the Honorable William E. Orr, a Justice of this Court of Appeals, Honorable Peirson M. Hall, Judge of the United States District Court of Los Angeles, and Honorable Dave Ling, Judge of the United States District Court of Arizona. In 1947, the United States Supreme Court reversed this decision and held the statutes (Home Owners' Loan Act, etc.) constitutional.

This Appellee does not believe that among its duties as trustee, it should be compelled to foresee, either the 1946 decision of the three-judge court holding the statute unconstitutional, the 1947 decision of the United States Supreme Court holding the statutes constitutional, or the 1952 opinion of this Court of Appeals; nor does this Appellee believe its duties as trustee require that it refuse all reconveyances until the final outcome of this litigation, thereby leaving the borrowers' homes and titles entangled for six or more years.

Reconveyances by this or any trustee under deeds of trust made during the pendency of this litigation, without order of the District Court, would have been in-

effective to convey or release any titles, and would have, in addition, exposed this Appellee, as trustee, to personal and individual liability to whomever were the successful litigants in the legal proceedings, thus far approximately six years in process.

Appellants make much of the point that some of the directors of the Long Beach Federal Savings and Loan Association were also officers of this Appellee, but reluctance of Title Insurance Companies to guarantee, in advance, the decision of litigation involving constitutional questions and conflicting claims, and of trustees confronted with conflicting demands, to interplead and seek court protection, did not originate with this proceeding.

The Court's attention is respectfully directed to the Pacific States Savings and Loan seizure and liquidation where the doctrine of exhaustion of administrative remedies is nowhere involved, and where the state courts were unable to clear the title tangles for six years.

See:

Zottarelli v. Pacific States, 211 P. 2d 23, 94 Cal. App. 2d 480 (Dist. Ct. of Appeal, Calif., 1949).

The achievements of the United States District Court with the approval of the United States Supreme Court in exercising interpleader jurisdiction so that any borrower by paying his loan into the registry of the Court could immediately secure a clear and marketable title seems to this Appellee to have escaped the attention of the Court of Appeals.

V.

TITLES WILL BE RECLOUDED BY
DISMISSAL.

This Court of Appeals' opinion states that notwithstanding the United States Supreme Court's remand to the District Court for:

“ . . . further . . . judicial proceedings, . . . ”
this Appellee's cross-claim in interpleader fails to state any claim upon which relief could be granted, and should be dismissed notwithstanding said United States Supreme Court decision.

Appeals from previous interventions were taken by appellants to this Court of Appeals in 1947, and by it dismissed in 1948. (*Fahey, et al. v. Mallonee, et al.*, No. 11867, dismissed February 25, 1948.)

Any mandate of this Court of Appeals directing dismissal of these proceedings will instantly recloud the titles to the homes of the 8,000 borrowers, cleared only through the various intervention proceedings, particularly the mass interpleader by the Long Beach Association in March of 1948, of some \$14,000,000.00 of notes, government bonds, and deeds of trust. By that mass interpleader, the court below cleared and quieted the title of the Long Beach Association to said deeds of trust, against the conflicting claims of the San Francisco-Portland-Los Angeles Banks. Pursuant to that Order, this Appellee, as trustee under said deeds of trust, has for the last four years reconveyed titles under said deeds of trust as directed by said Court Order.

According to the opinion of this Court of Appeals, the conflicting claims of the Los Angeles and San Francisco Banks are yet pending before the court below. The San Francisco Bank, with leave of this Court of Appeals, has filed an action to foreclose against \$7,000,000.00 of the

assets yet remaining in the registry of the Court, AND ALSO AGAINST THE TRUST DEEDS, TITLES TO WHICH WERE QUIETED AND CLEARED BY THE ORDER OF THE DISTRICT COURT OF MARCH 26, 1948.

The San Francisco Bank complaint reads in part:

“WHEREFORE, Federal Home Loan Bank of San Francisco prays judgment against Long Beach Federal Savings and Loan Association:

. . .

“2. For an order foreclosing the lien of said Federal Home Loan Bank of San Francisco. . . .”

This Appellee respectfully urges that whatever obligation the Shareholders' Protective Committee or the Association might have had in relation to administrative hearings and exhaustion of administrative remedies, no administrative action can, or could have, decided the ownership of the \$12,000,000.00 of trust deeds, as between the claims of the Los Angeles, Portland and San Francisco Banks, nor can administrative action recall or undo the 1946-1947 assignments by Ammann as conservator of \$12,000,000.00 of such notes and trust deeds to said San Francisco Bank in consideration of \$7,300,000.00 of seized Los Angeles Bank assets delivered by San Francisco Bank to said conservator Ammann.

Dismissal of this Appellee's cross-claim, six years after judgments based thereon, clearing titles, and five years after refusal by the United States Supreme Court to dismiss, will of course, recloud the titles thus cleared, and Appellee must thereafter refuse to issue further reconveyances at its peril of possible liability to any or all of the litigants.

The Court of Appeals' opinion appears to hold that no cause of action in interpleader could be stated by this

DESTROY THIS NOTE: When paid, this note, with Deed of Trust securing same, must be surrendered or cancellation, before reconveyance will be made.

Note Secured by Deed of Trust

00 Long Beach, California, May 28th,

I received I promise to pay to Long Beach Federal Savings and Loan Association, a Federal corporation,

office of Long Beach Federal Savings and Loan Association

Principal sum of Forty-five Hundred and no/100 (\$4500.00) - - - DOL

Interest from date hereof, 19, on unpaid principal

6 per cent per annum, interest payable monthly on the 1st day of each

period from May 28th, 1945, to August 1st,

dates inclusive: commencing September 1, 1945, principal and interest payable in m

ments of Forty-five and no/100 (\$45.00) DOLLARS each, on the 1st day o

and continuing until said principal and interest have been paid in full.

payment shall be credited first on interest then due and the remainder on principal; and interest shall be upon the principal so credited. Should default be made in payment of any installment when due, or in case of any agreement in the deed of trust securing the payment of this note, the whole sum of principal shall become immediately due at the option of the holder of this note and shall, at the option of such holder, be paid during the period of such default at the rate of 8 per cent per annum. Principal and interest payable in money of the United States. If action be instituted on this note, I promise to pay such sum as the Court may award for attorney's fees. The holder hereof agrees to accept additional payments, provided however, that should the sum of such payments equal or exceed 20 per cent of the original principal amount of the loan, 90 days unearned interest on the balance then due may be charged as a bonus.

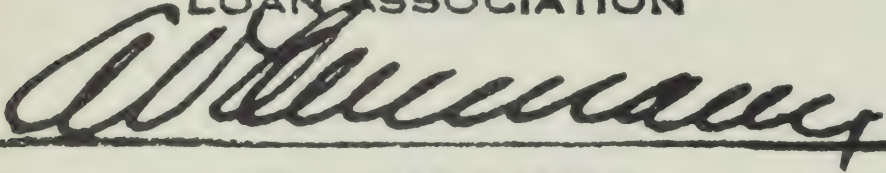
Note is secured by DEED OF TRUST to TITLE SERVICE COMPANY, A California corpo

William Shaub
Erlyn A. Sharp

PLATE 2

PAY TO THE ORDER OF THE FEDERAL HOME
LOAN BANK OF SAN FRANCISCO
LONG BEACH FEDERAL SAVINGS AND
LOAN ASSOCIATION

BY

A handwritten signature in cursive script, appearing to read "William", written over a horizontal line.

CONSERVATOR

Appellee as trustee until conclusion of an administrative hearing.

It is respectfully urged that these dire consequences not be inflicted upon the borrowers and homeowners who have for more than four years relied upon the titles to their homes as cleared by final Federal Court judgments. Judgments, when they become final, must stand as a guide for business transactions.

The San Francisco Bank obtained leave of this Court of Appeals without any notice whatsoever to this Appellee to commence an action in the California State Court for foreclosure of a claim of \$7,000,000.00, asserted against the Long Beach Federal Savings and Loan Association, and to foreclose deeds of trust once assigned to said San Francisco Bank by conservator Ammann, which assignments were cancelled in 1948 by final judgment of the District Court.

Tender of such notes and deeds of trust to this Appellee for reconveyance upon the sole order of said Long Beach Association continues to be a matter of every day occurrence. There are several thousand such notes and deeds of trust still outstanding. Attached is a photostatic copy of one of such notes, a fair specimen of the thousands (See Plate 1). It will be observed that the assignments by Ammann as conservator to the San Francisco Bank are undated (See Plate 2). The reasons for this may lie in the fact that on May 27, 1946, the District Court issued a restraining order against merger or assignment of Long Beach assets without notice to the Court. No such notice was ever given. Appellee believes that most of these assignments were prior to the earliest date set for any administrative hearing, to-wit, July 3, 1946.

VI.

**ADMINISTRATIVE HEARING CANNOT
CLEAR TITLES.**

This Appellee cannot comprehend how any administrative hearing, whether held in July of 1946 or in 1952 or 1953, can decide the question of ownership of the titles, among the conflicting claimants, San Francisco, Portland, Los Angeles Banks (and their Receiver), Long Beach Association, Long Beach Shareholders' Protective Committee, and appellant Ammann. (In pleadings filed in July of 1949, appellant Federal Savings and Loan Insurance Corporation then claimed that appellant Ammann was yet acting as conservator for the Long Beach Association, but had been unlawfully ousted by order of the District Court of January 23, 1948.)

Dismissals by this Court of Appeals of all proceedings before the District Court might have the effect of automatically re-instating and re-appointing Amman as conservator of Long Beach Association. If this be so, the effect on the titles of the homeowners and the savings of shareholders, may well exceed the original \$10,000,000.00 run of May 1946.

This appellee respectfully suggests that if, as the Court of Appeals' opinion holds, an administrative hearing is now essential, and a right of Court review thereof exists, that the title tangles cleared only by this litigation should remain clear. It is not necessary in order to have an administrative hearing to invalidate a series of final Federal Court judgments.

VII.

**DISMISSAL IS NOT NECESSARY. THIS CASE
MAY BE RETAINED ON THE DISTRICT
COURT'S DOCKET PENDING THE AD-
MINISTRATIVE HEARING.**

The doctrine of exhaustion of administrative remedies is not jurisdictional in the sense that no cause of action can be stated throughout any valid court proceeding. This matter may be retained on the District Court's docket pending the administrative hearing.

See:

Far East Conference, et al. v. United States of America, et al., 96 Adv. L. Ed. 390 (Mar. 10, 1952).

There is neither need nor justification for again clouding the titles to the homes of the 8,000 borrowers, merely to have an administrative hearing which must be reviewed by the courts in any event.

This Appellee therefore requests that the Court of Appeals, if it adheres to its opinion and orders dismissal, stay its mandate pending clarification by the United States Supreme Court of that Court's mandate in 1947 to the court below for

“ . . . further . . . judicial proceedings . . . ”

or, if this Court of Appeals desires that no titles of the homeowners may be conveyed or dealt with pending the administrative hearing discussed in the opinion, that Order of the Court of Appeals be made absolving this trustee for refusing to reconvey on the demand of any litigant until after the administrative hearing be completed, and the judicial review proceedings (held by the Court of Appeals' opinion to be the right of the litigants) be instituted and decided.

VIII.

**TITLE SERVICE COMPANY HAS STATED A
CAUSE OF ACTION IN ITS CROSS-CLAIM
AND THE COURT MUST RETAIN JURIS-
DICTION EVEN THOUGH THE MAIN AC-
TION FALLS.**

Title Service Company's cross-claim in interpleader states independent grounds of federal jurisdiction, both under the Interpleader Statute, old Title 28, Section 41(26), new Title 28, Sections 1335-2361, and alleged diversity of citizenship. The jurisdictional amount of \$500.00 was exceeded by several million. Under these circumstances, dismissal of the original complaint or of other pleadings would not affect the jurisdiction of the Court to decide conflicting ownership claims as to the interplead notes, deeds of trust, and titles to real estate, including the titles of the 8,000 homeowners.

Railway Express v. Jones, 106 F. 2d 341, C. C. A. 7 (1939);

Isenberg v. Biddle, 125 F. 2d 741, C. C. A. D. C. (1941);

San Diego Flume Co. v. Souther, 90 Fed. 164, C. C. A. 9 (1898).

CONCLUSION.

For the protection of the 8,000 homeowners for whom this Appellee is trustee, and to prevent the reclouding of such homeowners' titles, Appellee requests an opportunity to present to the Court of Appeals, the effect on such homeowners' titles if dismissal is ordered. Application to the United States Supreme Court for certiorari will require time consuming petitions, briefs, etc., preparation of which cannot be commenced until the outcome of the petitions for rehearing is known. Stay of the issuance of a mandate by the Court of Appeals is respectfully requested if rehearing is not granted.

Respectfully submitted,

LYMAN B. SUTTER,

Attorney for Appellee, Title Service Company.

Certificate of Merit by Counsel for Trustee.

The undersigned, attorney for Appellee Title Service Company, in compliance with Rule 25 of the rules of this Honorable Court of Appeals, hereby certifies that in his judgment this petition for rehearing is justified in law, is a necessary part of said trustee's duties, and is not interposed for delay.

LYMAN B. SUTTER,

Attorney for Appellee, Title Service Company.

No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, *et al.*,

Appellants,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

PETITION FOR REHEARING BY APPELLEE
ROBERT H. WALLIS.

RAYMOND TREMAINE,

210 West Seventh Street,

Los Angeles 14, California,

Attorney for Appellee Robert H. Wallis.

FILED

MAY 1 - 1952

PAUL P. O'BRIEN

CLERK

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No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, *et al.*,

Appellants,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

PETITION FOR REHEARING BY APPELLEE ROBERT H. WALLIS.

Preliminary Statement.

The disposition of Appellee Wallis in the opinion of the Court herein filed April 2, 1952, is set forth in said opinion at pages 52 and 53 as follows:

“And we think it quite clear that the pleadings of the subsidiary and interpleading litigants Wallis and Home Investment Company (to which we refer in Part I of this opinion) failed to tender an issue or issues which presented a claim upon which relief could have been granted by the court—this, if for no other reason than the posture of the claims of the Mallonee-Association group then before the court which revealed unresolved doubts as to the control of Ammann over the property and affairs of Association of which the claims of Wallis and Home Investment are part and parcel. If the relief then

demanded from the court by the Mallonee-Association group was improperly and unlawfully granted by the court, it is certain that the ancillary and subsidiary claims of these litigants which arose only out of the claims of Association, were without substance in law. The validity of their claims rested upon the validity of the claims of Association. If the claims of Association were untenable in law, it is obvious that the claims of these litigants could rise no higher than their source. Settlement of the issue as to the validity of the conservatorship and the extent of the Conservator's control of Association's affairs would have reached every area of the controversy and resolved the basic issues presented in the contentions of these two parties.

“Predicated on the views expressed above we now hold that the Court should have dismissed all of these original (five) actions for the reason that they failed to state a claim upon which relief could be granted and for the further reason that Association had failed to exhaust tendered and available administrative remedies under the valid and applicable rules and regulations of Administration above mentioned.”

If the decision of this Court is to stand and be a precedent it will, in effect, destroy the entire system of checks and balances of the Government of the United States. If a wrongdoer seeking to justify his unlawful acts may simply, by virtue of his holding a public office, raises fictitious charges of others committing wrongs, thereby sets himself up as the judge to dispose of the charges against himself, the result is tyranny.

The aforesaid disposition of his cross-claim in the nature of interpleader the appellee, Robert H. Wallis, respectfully contends deprives him of his legal remedy of

his right to interplead and in support thereof argues as set forth below.

I.

The Court Erred in Stating the Wallis Claim Rises or Falls With a Resolving of Ammann's Rights as Conservator.

There is no direct relationship between the validity of Ammann's appointment and the right of the Association to pay counsel to defend it against seizure. This right of defense is not governed by the ultimate success or failure of that defense. If this right of defense is lost the individual may not defend against the government without administrative leave.

II.

Wallis Has a Statutory Right to Interplead.

Statutory authority to interplead is contained in 28 *U. S. Code Annotated*, Sec. 1335 (formerly 28 *U. S. C. A.*, Sec. 41(26)). This section specifically includes actions in the nature of interpleader. The sufficiency of the form or contents of the cross-claim of Wallis is not here under attack and was not questioned by this Court in its opinion herein and is therefore assumed to be adequate as to form and sufficiency. For brevity its sufficiency is not here argued, as its sufficiency to state a cause of action in interpleader is apparently admitted. The venue of this cross-action is established by 28 *U. S. C.*, Sec. 1397, and is not here attacked. That process under the cross-action of Wallis may and has issued outside of California together with the authority of the Court to restrain other proceedings is established by 28 *U. S. C. A.*, Sec. 2361, and is apparently not here questioned.

Abundant authority for the above statement can be furnished if questioned. Supporting citations are not here included only because the points are believed to be admitted by all parties and the decision to be bottomed on a different theory.

III.

Appellee Wallis Had a Right to Interplead Regardless of the Availability of Other Remedies.

This cross-complainant "had a right to resort to the remedy of interpleader regardless of what other remedies were available," as said in the case of *Hunter v. Federal Life Insurance Co.*, 111 F. 2d 551, 556 (1940), the District Court having assumed jurisdiction, the Circuit Court of Appeals, Eighth Circuit, stated the District Court "has the power to grant full relief, including the allowance of a proper set-off against any particular claim growing out of any contract which entitled a claimant to pursue the fund."

See also:

American Surety Co. v. Calcasieu Oil Co., 3 Fed. Supp. 939, 941.

There can be no question but that the cashier's check interplead is property within the meaning of the act.

Omaha National Bank v. Federal Reserve Bank,
26 F. 2d 884.

IV.

The Jurisdiction of the District Court Having Been Established and the Court Being a Court of Equity May and Should Determine All of the Issues of the Litigation at Least to the Extent Necessary to Determine the Issues Raised in the Wallis and Other Cross-actions.

This point was argued at length in the Wallis brief herein at pages 13-21, in the Association's brief herein at pages 123-159, and in the brief of the Shareholders Protective Committee herein at pages 44-50.

We respectfully submit the various arguments of appellees all to the same effect are not refuted and establish the lawful right of Wallis and other interpleaders to a judgment on the merits in the Court below.

V.

The Right of Wallis to a Determination of the Issues Raised in His Cross-action Has Been Decided in His Favor.

This appellee was attorney for Long Beach Association at the time of its seizure in May of 1946, and as such, received a \$50,000.00 cashier's check from said Association for use to defend said Association against confiscation. Appellee deposited said cashier's check into the registry of the Court below in interpleader, intact and uncashed, and asked that the Court make allowances to the attorneys defending said Association.

Such allowances were made, and both the United States Supreme Court in *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, in June of 1947, and this Court of Appeals in

December of 1947, refused to stay or vacate such allowances.

The present Court of Appeals' opinion indicates that dismissal of this appellee's cross-claim in interpleader should have been made because it "failed to state a claim upon which relief could be granted and for the further reason that Association had failed to exhaust tendered and available administrative remedies."

This appellee's cross-claim in interpleader was before the United States Supreme Court and was there attacked by appellants in 1946 and 1947, both on appeal and by writs. The cross-claim has not been amended in any way since these attacks and the United States Supreme Court remand to the District Court for "other administrative or JUDICIAL PROCEEDINGS which may be warranted by law." (Emphasis ours.)

This appellee was subjected to a demand by the conservator Ammann, a citizen of Maryland, for delivery of the \$50,000.00 cashiers' check to said Ammann, and was sued by the Mallonee-Shareholders' Protective Committee, citizens of California, for an order of court requiring him to use said check for defense of the Association.

Appellants claimed that the Association must be completely defenseless after they seized it, that no assets could be used for the payment of expenses for the defense of the Association against the confiscation.

This appellee had no administrative remedies to exhaust. His duties, as an attorney at law, to defend said Association in court or to abandon it to confiscation were not to be decided at administrative hearings, nor were appellee's obligations as an attorney to defend said Asso-

ciation or to use the \$50,000.00 appropriated for the Association's defense, to be decided by administrative proceedings.

This appellee was admitted as a member of the bar of the United States Supreme Court, and of the District Court at Los Angeles, by those Courts, and not by any administrative tribunals, and his obligations as such attorney can be decided only by those Courts.

Had appellee returned the cashiers' check as demanded by Ammann, no administrative hearing could have protected him against his liability to the Shareholders' Committee, if the Association was thereby rendered helpless in its defense; nor, had he cashed and spent the \$50,000.00 cashiers' check, as demanded by the Shareholders' Committee, could the administrative hearing have determined the reasonableness, nor the amount of appellee's or any other attorneys' fees, for defense of the Association from confiscation.

In *Ex parte Fahey*, 332 U. S. 258 (1947), the Supreme Court said:

"We hold that the appellants' grievance is one to be pursued by appeal . . . to the appropriate court"

Thereafter, such appeal was taken in 1947 to this Court of Appeals and was dismissed.

The Supreme Court did not say that the administrative board should decide the amount of fees to be paid to the attorney suing that board for fraud.

In March of 1949, after the restoration of the Association to its founding management, the District Court heard applications by various counsel for allowance and determination of their attorneys' fees and expenses in the litigation resulting in the removal of the conservator.

An allowance of \$540,000.00 was made by the District Court. Consent of the attorneys to vacate this allowance was sought by appellants.

Peyton Ford, the Assistant to the Attorney General of the United States, filed with the court below a letter by which he agreed on behalf of all appellants that,

“ . . . any further attorneys’ fees shall be judicially determined in an adversary proceeding”

Another portion of said letter provides:

“If no settlement be reached, any additional fees shall be judicially determined in said litigation.”
[Appeal No. 12511, R. 6562-6564.]

Three years have now passed and no such settlement has been reached.

In connection with said letter, the Court found:

“That this Court and the parties and all of them, relied upon said letter of said attorney Peyton Ford, Assistant to the Attorney General of the United States,” [Appeal No. 12591, R. 299.]

By such letter and proceedings in reliance thereon, all questions concerning attorneys’ fees and the payment thereof were submitted by appellants to the court below for judicial determination thereof.

Appellants by express written waiver of right of appeal [R. 6547-6550] or by dismissal of appeals, have consented to the payment of \$260,000.00 thereof [R. 3550-3552] and in addition have approved payment by appellant San Francisco Bank of an additional \$100,000.00. Who, among the parties and assets, is liable for payment of these and other expenses of litigation, is one of the issues yet pending for decision before said United States District Court.

VI.

The Instant Appeal Raises Only the Propriety of the Preliminary Injunction Restraining an Administrative Hearing and Does Not Encompass a Determination of Any Other Issue Including the Wallis and Other Cross-actions.

The record speaks for itself. If Los Angeles Bank is not concerned with this appeal then Wallis is not (Opinion herein, p. 59).

VII.

Appellee Wallis Is Entitled to a Trial in the Court Below Regardless of the Disposition of Other Pleadings in the Litigation.

In *Hunter v. Federal Life Ins. Co.*, 111 F. 2d 551 (C. C. A. 8, 1940), the Court stated:

“The jurisdiction of a federal court to entertain a bill of interpleader is not dependent upon the merits of the claims of the defendants. Metropolitan Life Ins. Co. v. Segartis, D. C., 20 F. Supp. 739. It is our opinion that a stakeholder, acting in good faith, may maintain a suit in interpleader for the purpose of ridding himself of the vexation and expense of resisting adverse claims, even though he believes that only one of them is meritorious . . .” (Emphasis added.)

VIII.

**Even a Dismissal of Action of Plaintiffs Would Not
Defeat the Cross-relief in Interpleader Sought by
Wallis and Other Cross-claimants**

Dismissal of plaintiffs' original complaint or other parties pleadings for failure to state a cause of action for lack of jurisdiction does not justify dismissal of cross-claims, counterclaims, or cross-bills of other parties. Such is the rule in the Ninth Circuit and elsewhere.

See the case of:

Railway Express v. Jones, 106 F. 2d 341 (C. C. A. 7, 1939).

The Court stated at page 343:

“ . . . The Railway Express' right to file its interpleader is not established nor defeated by the merits of Plaintiffs' claim . . . ”

and at page 345:

“By proceeding under the counterclaim of the Railway Express the jurisdiction of the Court will be unassailable, and the claims of all claimants may be litigated exactly the same as in a proper class suit.

“ . . . ”

“The orders appealed from are reversed with directions to permit the filing of the counterclaim and to proceed further in this suit on said counterclaim.
 . . . ”

On the same point see also:

Isenberg v. Biddle, 125 F. 2d 741 (C. C. A., D. C., 1941),

at pages 743-744:

“ . . . The rule is that in such circumstances, when the counterclaim seeks affirmative relief, it is

sustainable without regard to what happens to the original complaint. *Lion Mfg. Corp. v. Chicago Flexible S. Co.*, 7 Cir., 106 F. 2d 930, 933; *Vidal v. South American Securities Co.*, 2 Cir., 276 F. 855, 874; *Jackson v. Simmons*, 7 Cir., 98 F. 768. In the *Jackson* case the Court of Appeals of the Seventh Circuit said: 'But a cross bill which seeks affirmative relief is in the nature of an original bill wherein the cross complainant is the actor. Such a cross bill is not dependent upon the original bill, is not subject to the control of the complainant in the original bill, and does not fall with the dismissal of the original bill, whether that dismissal be the act of the complainant or the act of the court.' 98 F. page 733. And see also *Buffalo Specialty Co. v. Vancleef*, D.C., 217 F. 91."

In the case of:

Vidal v. South American Securities Co., 276 Fed. 855 (C. C. A. 2, 1921) (rehearing, Jan. 11, 1922),

the Second Circuit had followed what it had thought to be the general rule that a cross-bill falls with the original bill, and had dismissed the counterclaims. However, on petition for rehearing, the court reversed itself on this subject and stated at pages 874 and 875:

"As the counterclaims set up causes of action within the jurisdiction of the court as a court of equity, and within its jurisdiction as a federal court because of the citizenship of the parties, . . . they should not have been dismissed, but should have been treated as original bills upon the dismissal of the original bill. . . ."

To the same effect, see also:

Barber Asphalt Corp. v. La Fera Grecco Contr. Co., 116 F. 2d 211 at 216 and 217 (C. C. A. 3, 1940).

See also the case of:

Lion Mfg. Corp. v. Chicago Flexible S. Co., 106 F. 2d 930 (C. C. A. 7, 1939).

In the case of:

San Diego Flume Co. v. Souther, 90 Fed. 164 (C. C. A. 9, 1898),

the District Court had dismissed both the original complaint and a cross-bill in equity on the ground that the original bill of complaint stated no facts that would justify the relief prayed for. The Ninth Circuit reversed and held the cross-bill stated a cause of action and had independent grounds of federal jurisdiction. It affirmed the dismissal of the original complaint but set aside the dismissal of the cross-bill (p. 171) and remanded the cause for further proceedings.

A rehearing was sought and granted, and in 104 Fed. 706 the court affirmed the correctness of its former ruling that the judgment of the trial court should be reversed as to the cross-bill and so ordered.

The District Court then proceeded on the cross-bill alone after dismissal of the original complaint and gave the cross-complainant the relief prayed for.

There was a second appeal to the Ninth Circuit, the opinion of which appears in 121 Fed. 374, and sustained the judgment in favor of the cross-complainant except for a modification on the amount of damages.

This decision was cited and followed in *Vidal v. South American Securities Co.* (*supra*).

IX.

Request for Stay of Mandate.

If the Court of Appeals intends to rule, as its opinion indicates, that appellee must submit for decision by the administrative hearing, the amounts and reasonableness of all attorneys' fees for the defense of the Association now sued for foreclosure of \$7,000,000.00 of its assets by San Francisco Bank, this appellee respectfully urges the withholding of the issuance of the remand from the Court of Appeals. Such ruling is expressly contrary to *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, in which the United States Supreme Court denied writs against payment of the \$50,000.00 of attorneys' fees in 1947, and is also in violation of the remand of this Court of Appeals in February of 1948, in Appeal No. 11751, wherein the previous appeals by appellants Ammann, *et al.*, were dismissed by this Court of Appeals.

Such ruling is further contrary to the denial of stay by this Honorable Court of Appeals, Justices Clifton Mathews, Albert Lee Stephens and William E. Orr, Justice Orr withdrawing and being replaced by Justice William Healy in Appeal No. 11751 in December of 1947.

Under these circumstances, return to Appellee Robert H. Wallis of the \$50,000.00 cashier's check on deposit in the registry of the Court would be ineffective to discharge this appellee of liability, unless such return be ordered by the United States Supreme Court, in further proceedings under *Ex parte Fahey (supra)*, wherein writ of prohibition, mandamus and/or injunction against the District Court proceedings on these very matters were denied.

Conclusion.

In conclusion, appellee, Robert H. Wallis, respectfully requests the opportunity to reargue in the Court of Appeals the possible effect of its opinion which:

1. Violates the mandate of the United State Supreme Court in the 1947 decisions of *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, and *Fahey v. Mallonee*, 332 U. S. 245, 91 L. Ed. 2030, by making administrative determination of attorneys' fees a prerequisite to interpleader of the \$50,000.00 cashier's check; the subject of disputes as to ownership thereof, between the conservator who demanded it be returned to him, and the Shareholders' Protective Committee who demanded that it be expended to prevent the Association's confiscation;

2. Dismisses the pending actions and thereby takes from the Court issues concerning attorneys' fees submitted to that Court for decision by letter from the United States Attorney General, filed with the Court and relied upon by the Court and the parties in vacating a prior \$540,000.00 award of attorneys' fees made by the Court after hearing;

3. Denies the statutory right of this appellee to interpleader protection against liability asserted by the wholly inconsistent and contradictory claims of conservator and the Shareholders' Protective Committee, and the multiplicity of actions which result;

4. Confronts Appellee Wallis with conflicting claims to the check deposited with the clerk. Should this cross-action in the nature of interpleader be dismissed he would be faced with multiple suits before he could safely himself take or deliver the money to anyone;

5. Requires that attorneys defending a savings association from confiscation and suing the administrative body for fraud, submit to that administrative body for decision the question of how much, if any, attorneys' fees can be paid to such attorneys;

6. Prevents any savings association from appropriating any attorneys' fees for its defense thereby rendering such appropriations subject to administrative proceedings and effectively denies right of counsel to a confiscated association, contrary to *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041.

To force Wallis and the other appellees into the tender mercies of the wrongdoers themselves is not justice.

Respectfully submitted,

RAYMOND TREMAINE,

Attorney for Appellee Robert H. Wallis.

Certificate of Counsel.

I, Raymond Tremaine, pursuant to Rule 25 of the Rules of this Court, as counsel for appellee herein, Robert H. Wallis, hereby certify that in my judgment the foregoing petition is well founded. It is not interposed for delay.

RAYMOND TREMAINE,

Attorney for Appellee Robert H. Wallis.

